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REPORT

ON

CLASS ACTIONS

ONTARIO LAW REFORM COMMISSION

VOLUME II

Ministry of the
Attorney
General

1982

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The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions. The Commissioners are:

DEREK MENDES DA COSTA, Q.C., LL.B., LL.M., S.J.D., LL.D., *Chairman*

H. ALLAN LEAL, Q.C., LL.M., LL.D., *Vice Chairman*

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During the course of the Class Actions Project, the Honourable G. A. Gale, C.C., Q.C., LL.D., retired as Vice Chairman of the Commission because of ill health. While the Commission benefited greatly from Mr. Gale's knowledge and experience and acknowledges its indebtedness to him, we wish to state that he did not agree with all the recommendations contained in this Report, particularly those relating to costs.

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VOLUME I

CHAPTER 7

CERTIFICATION OF A CLASS ACTION: THE PRELIMINARY MERITS TEST

1. INTRODUCTION

In the preceding chapter, the Commission recommended the adoption in Ontario of a private class action procedure modelled after Rule 23 of the United States Federal Rules of Civil Procedure, and outlined briefly the three major stages of the class action procedure to be proposed in this Report. In this chapter, and in chapters 8, 9, and 10, we shall discuss the first stage of this procedure – the certification of a class action.

In some respects, the motion for certification is the most important part of the proposed procedure. It is on the certification motion, which normally will take place soon after an action in class form has been commenced,[1] that the court is given an opportunity to examine the action and to determine whether it is appropriate for class treatment. Denial of certification usually will mean, in the case of individually nonrecoverable claims,[2] that no actions will be brought, since by definition individual actions for these kinds of claim are economically irrational. Where a court certifies an action as a class action, many issues incidental to the resolution of the dispute, such as notice,[3] definition of the common questions,[4] and the right of members of the class to exclude themselves from the action,[5] will be decided at this stage.

We have seen that, under the present Ontario class action Rule, only two requirements must be satisfied in order to be able to institute a class action: a numerosity requirement and a same interest requirement.[6] In chapter 2 of this Report, we described both the difficulties created by the present Ontario class action Rule and the Rule's deficiencies, particularly the inadequate safeguards for the interests of absent class members.

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[1] See *infra*, ch. 10, sec. 1.

[2] This term is defined in Note, "Developments in the Law – Class Actions" (1976), 89 Harv. L. Rev. 1318, at 1356 (hereinafter referred to as "Harvard Developments").

[3] See *infra*, ch. 13.

[4] See *infra*, ch. 10, sec. 4(c)(i).

[5] See *infra*, ch. 12.

[6] See *supra*, ch. 2, sec. 2(c)(i).

It will be recommended in this and later chapters that a court should be able to certify an action as a class action only if it finds that five conditions are satisfied by the representative plaintiff. These conditions are: (1) a preliminary merits test;[7] (2) that the class is numerous;[8] (3) that there are questions of fact or law common to the class;[9] (4) that the class action is superior to other procedural alternatives;[10] and (5) that the representative plaintiff will fairly and adequately protect the interests of the class.[11] In addition, it will be recommended that, even where the abovementioned conditions are satisfied, a court should be able to refuse to certify an action as a class action if it can be established that the "costs" of proceeding by way of a class action exceed the "benefits" of so proceeding.[12] In this chapter, we consider the first test to be met by a representative plaintiff on a certification motion – the preliminary merits test.

2. THE NEED FOR A SUBSTANTIVE ADEQUACY REQUIREMENT

Under the present rules of civil procedure,[13] no plaintiff is required to establish the substantive adequacy of his claim as a prerequisite to the maintenance of his action. This is true of all actions, including class actions. However, this is not to suggest that the strength of the plaintiff's action cannot be tested at an early stage in the litigation. For example, under Rule 126 of the existing Supreme Court of Ontario Rules of Practice, "[a] judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action . . .". Rule 126 also empowers a judge to order an action to be "stayed or dismissed, or judgment to be entered accordingly" if the action is shown to be frivolous or vexatious.

While this Rule is clearly relevant to class actions brought pursuant to Rule 75 of the Rules of Practice, there are certain features of Rule 126 that render it a less than adequate device for determining which actions should be allowed to proceed as class actions. First, it should be noted that, on a Rule 126 application, it is the defendant who bears the onus of establishing the deficiencies of the action brought against him. Secondly, insofar as the first part of Rule 126 is concerned – that is, that there is no reasonable cause of action – it is important to point out that, for the purposes of the defendant's application, the facts as pleaded by the plaintiff are assumed to be true.[14]

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[7] See *infra*, this ch.

[8] See *infra*, ch. 8, sec. 2(d).

[9] *Ibid.*, sec. 3(c)(v).

[10] See *infra*, ch. 9, sec. 3(b).

[11] See *infra*, ch. 8, sec. 4(c)(ii).

[12] See *infra*, ch. 9, sec. 3(c).

[13] Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540.

[14] See Williston and Rolls, *The Law of Civil Procedure* (1970), Vol. 2, at 730-31, and the cases collected in Gale, Marriott, and Hemmerick (eds.), *Holmested and Gale on The Judicature Act of Ontario and Rules of Practice* (Rel. 12, March 1980), at 1077-78 (hereinafter referred to as "Holmested and Gale").

Consequently, as long as the class representative frames the claim properly, Rule 126 will be of little benefit to the defendant in a class action. We should point out that Rule 126 has been employed by defendants to obtain the dismissal of class actions. However, dismissals have been secured, not on the basis that the representative plaintiff's claim fails to disclose a reasonable cause of action, but rather on the ground that the action fails to meet the requirements for a class action under Rule 75 of the Supreme Court of Ontario Rules of Practice.[15] Thirdly, because of the cautious way in which the courts traditionally have approached Rule 126 applications, the defendant is unlikely to be able to dispose of a claim that is weak in law in this way. The courts have stated repeatedly that an action should be struck out on the ground that it discloses no reasonable cause of action only in the clearest of cases.[16] Finally, this cautious attitude to Rule 126 applications is also evident in cases where it is alleged that the plaintiff's action is frivolous or vexatious.[17] In short, then, Rule 126 provides a far from effective device for eliminating unmeritorious class actions.[18]

Rule 23 of the United States Federal Rules of Procedure,[19] like Rule 75 of the Supreme Court of Ontario Rules of Practice, contains no express requirement that the representative plaintiff establish the substantive adequacy of the class claim brought by him. Although Rule 23 was interpreted in some early cases as imposing such a requirement on the representative plaintiff,[20] it is now clear that he need not demonstrate a probability of success on the merits as a prerequisite to maintaining a class action.[21] Nonetheless, in certain circumstances, the merits of a class claim brought pursuant to Rule 23 may be tested at an early stage in the proceedings. For example, the United States Federal Rules of Civil Procedure contain a provision similar to Rule 126 of the Supreme Court of Ontario Rules of Practice, which can be used to secure immunity from a suit that fails "to state

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[15] Rule 126 would seem to be a particularly inappropriate means of testing the propriety of class actions in particular cases, since it is directed towards weeding out unmeritorious claims, not actions that fail to comply in one way or another with the strictures of the rules of civil procedure.

[16] See Williston and Rolls, *supra*, note 14, at 731, and Holmested and Gale, *supra*, note 14, at 1057-61.

[17] *Ibid.*

[18] Under the Rules of Civil Procedure proposed by the Civil Procedure Revision Committee, the courts would continue to possess the power to dismiss an action on the ground that it is frivolous or vexatious or that it discloses no reasonable cause of action: see Province of Ontario, Ministry of the Attorney General, Civil Procedure Revision Committee, untitled report (June 1980), Proposed Rules of Civil Procedure, rr. 23.01(b) and 23.01(2)(d) (hereinafter referred to as "Williston Committee Rules").

[19] Fed. R. Civ. P. 23, promulgated at 383 U.S. 1029 (1961).

[20] See, for example, *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968).

[21] *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). See, also, *Sanders v. Faraday Laboratories, Inc.*, 82 F.R.D. 99 (E.D.N.Y. 1979), at 101, and *In re Fine Paper Antitrust Litigation*, 82 F.R.D. 143 (E.D. Pa. 1979), at 148. Compare, however, *Bass v. Boston Five Cent Savings Bank*, 478 F. Supp. 741 (D. Mass. 1979), and *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460 (N.D. Cal. 1978). In *Bass*, the Court, at 745, commented as follows:

a claim upon which relief can be granted".[22] More importantly, the Federal Rules of Civil Procedure contain a rule that enables a court to grant summary judgment where it can be shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".[23] In the absence of a requirement in Rule 23 that the representative plaintiff satisfy the court of the likely success of the class action brought by him, class action defendants have used these other techniques available under the Federal Rules of Civil Procedure to dispose of unmeritorious class actions at an early stage in the proceedings.[24]

While Rule 126 of the Supreme Court of Ontario Rules of Practice and a summary judgment procedure, if and when available,[25] may be seen as possible means of disposing of unmeritorious class actions, for a number of reasons the Commission finds them to be inadequate. As we have noted, these procedural techniques for the early disposition of weak claims require the defendant to satisfy the court of the fatal deficiencies of the plaintiff's case. Given the unique nature of class actions, the Commission is of the opinion that the representative plaintiff should be under a duty to satisfy the court of the substantive adequacy of his claim. Only when the representative plaintiff is able to meet such a requirement do we believe that a court should certify the class action.

The Commission believes that, although there is no evidence to suggest that class actions have been used to "blackmail" defendants into settlements that they otherwise would not have made,[26] class actions have the potential to

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> While it is clear that a party seeking to utilize the class action format need not establish the merits of his case before a preliminary determination of the class action question can be made . . . before an evidentiary hearing need be afforded, plaintiffs should make a minimal showing that their class action claims have substance.

[22] Fed. R. Civ. P. 12(h).

[23] Fed. R. Civ. P. 56(c).

[24] The empirical evidence available to us reveals, for example, that a large percentage of damage class actions have been disposed of in favour of the defendant on preliminary motions, a substantial percentage of which have been motions for failure to state a claim or motions for summary judgment.

The *Senate Study* (Staff of Senate Comm. on Commerce, 93d Cong., 2d Sess., *Class Action Study* (Comm. Print 1974)) reveals that 54.3% of plaintiff class actions were disposed of in favour of the defendant on preliminary motions. Almost one-fifth of these cases were terminated for failure to state a claim, and 13.6% were the result of successful summary judgment applications by defendants. These percentages were calculated by the Ontario Law Reform Commission from data in this study: see *supra*, ch. 4, sec. 3(b)(i)a., Table 1 and accompanying text.

It has been suggested in at least one commentary that, "[a]lthough it has traditionally been thought that 'summary judgment procedures should be used sparingly in complex antitrust litigation' . . . in recent years courts, while repeating the maxim, have not hesitated to make use of summary judgment to dispose of nonmeritorious antitrust actions", many of which are brought in the form of class actions: see Harvard Developments, *supra*, note 2, at 1364, *n.* 162.

[25] See Williston Committee Rules, *supra*, note 18, r. 22.

[26] See discussion *supra*, ch. 4, sec. 3(b)(i)a.

be used in this way. Because class actions make possible the aggregation of many claims, a defendant will often be faced with a large potential liability. As in the case of an individual action where a large amount is claimed, a defendant who is confronted with a claim in class form for millions of dollars may well prefer to settle the action rather than run the risk of an unfavourable judgment, even though he may have doubts about the validity of the claim. A preliminary merits test will help to ensure that unmeritorious class actions are weeded out at a very early stage in the litigation, thereby reducing the potential for this kind of abuse. However, in discussing the value of a preliminary merits test as a prophylactic measure against potential abuse of the proposed class action procedure, it is important to distinguish between a settlement that results from the threat of a ruinous, but unmeritorious, suit, and a settlement based upon a genuine assessment of the merits of the claim by the parties. The preliminary merits test that we propose is intended to prevent the former type of settlement. It is not designed to prevent settlements that are the result of a genuine assessment of the merits of the claim by the parties to the action. Indeed, we are of the view that such settlements should be encouraged, rather than discouraged.

Another ground upon which a preliminary merits test may be justified has to do with the innovative features of the class action procedure to be proposed in this Report, particularly the Commission's recommendations respecting costs and monetary relief. In the case of costs, we shall propose, in chapter 17,[27] the introduction of a "no way" costs rule in respect of class actions instead of the "two way" costs rule applicable to most litigation in this jurisdiction. Insofar as monetary relief is concerned, we shall recommend, in chapter 14 of this Report,[28] that the court should be able to assess damages in the aggregate, that is to say, that the court should be able, in appropriate cases, to fix the total liability of the defendant on the basis of the harm done to the class as a whole. The imposition of a preliminary merits test, therefore, may be seen as a means of ensuring that these extraordinary measures are restricted to those cases for which they have been designed. We do not believe that they should be available to assist litigants with unmeritorious claims.

The imposition of a preliminary merits test can be supported on a third ground. The Commission anticipates that many class actions will be complex in nature. Because of their complexity and certain features of class proceedings,[29] such actions are likely to present the courts of this Province with administrative difficulties that may prove quite burdensome. Consequently, we are of the view that putative class actions should be required to undergo careful scrutiny by the courts, including a preliminary merits test, in order to minimize the pressures that class actions will bring to bear on the administration of justice.[30]

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[27] See *infra*, ch. 17, sec. 5(a).

[28] See *infra*, ch. 14, sec. 3(b).

[29] For example, the right to exclude oneself from the action, notice, and individual assessments of damages.

[30] The Commission, in chapters 8 and 9, recommends the imposition of certain other preconditions to certification directed at minimizing the impact of class actions on the administration of justice.

What then are the arguments against the inclusion in the proposed class action procedure of a substantive adequacy requirement, that is, an obligation on the representative plaintiff to satisfy the court of the apparent validity of the claim against the defendant? First, some commentators have objected to any preliminary merits test on the ground that it requires a court to assess the merits of the class action on two separate occasions, at perhaps substantial cost to the parties, that is, once at the certification hearing and again at the trial of the action.[31] However, this clearly will not be the case in all class actions. For example, if the representative plaintiff fails to satisfy the court of the apparent validity of the class claim, the court will not need to examine the merits of the claim at a later date; there will be no class action. Where, after certification of the class action, the suit is settled by the parties, again there will be no re-examination of the substantive adequacy of the claim brought on behalf of the class. Moreover, relitigation of the merits of an action is not a novel procedure in Ontario. Motions for judgment on a specially endorsed writ under Rule 58 of the Supreme Court of Ontario Rules of Practice, motions for leave to commence a derivative action pursuant to section 97 of the *Business Corporations Act*,[32] and motions for interlocutory injunctions[33] all involve a potential for relitigation of the merits.

A second argument that has been advanced against a preliminary merits test is the possible prejudice to defendants that might result from such a precondition. It is contended that, once a court has found in favour of the class, however tentatively, another court will be reluctant to decide the issue in a different way. While there may be some psychological barrier to a second court's coming to an opposite conclusion on the merits issue, we do not believe that judges in Ontario will be averse to drawing different conclusions where this can be justified. Moreover, it is important to recognize the theoretical and practical distinction between the determination of an issue on a preliminary basis, relying on affidavit evidence and any examination thereon,[34] and the final determination of the same issue, after full discoveries have been held and *viva voce* examination and cross-examination of many witnesses have been conducted. Account also should be taken of the imposition at trial of a stricter standard of proof. The courts in this Province frequently are called upon to draw just such distinctions, and they seem to have met their responsibility without great difficulty.

A third argument against any preliminary merits test is that such a test would impose a substantial burden upon class representatives. We recognize that, ordinarily, a plaintiff is not required to satisfy the court that his claim has substance. We also are fully aware of the negative effect that such a requirement may have on class actions, and that, as a result of such a requirement, some actions that ultimately might succeed at trial will not be

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[31] See Note, "A (c)(1) Hearing on Maintainability of a Class Action Suit Should Not Determine Ultimate Merits of Individual Claim" (1973), 11 Houston L. Rev. 732, at 738-39.

[32] R.S.O. 1980, c. 54.

[33] See the *Judicature Act*, R.S.O. 1980, c. 223, s. 19(1).

[34] For the Commission's recommendations concerning the manner in which evidence on the certification motion should be placed before the court, see *infra*, ch. 10, sec. 2.

allowed to proceed in class form. Although the Commission does not minimize the significance of these objections to a preliminary merits test, we believe that the advantages to be secured by imposing such a test warrant accepting the possibility that this result may ensue in a small number of cases.

Those who oppose the introduction of any preliminary examination of the substantive adequacy of a class action, whether they do so with the rights of plaintiffs or defendants in mind, are able to point to the absence, noted above, of any such requirement in Rule 23 of the United States Federal Rules of Civil Procedure. While some American courts have read such a requirement into Rule 23,[35] as was stated previously, authority is clearly against any assessment of the merits of a class action at a preliminary stage in the proceedings.[36] On the other hand, there is considerable support in the United States for the amendment of Rule 23 to include a preliminary merits test as a means of providing some protection to class action defendants.[37]

Having considered the various arguments for and against an early test of the substantive adequacy of class actions, the Commission has concluded that proof by the representative plaintiff of the substantive adequacy of the action should constitute one of the requirements for certification, and we so recommend.[38] Undoubtedly, this recommendation will make the bringing of class actions more difficult. At the same time, we shall propose in a subsequent chapter a procedure that will guarantee that a representative plaintiff will have access to the information in the possession of the defendant necessary to help him meet the preliminary merits test proposed below.[39] This compromise, we believe, is a reasonable means of guarding against potential abuse of the class action procedure. We are confirmed in this view by the fact that a great majority of the class action mechanisms proposed or created in

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[35] See, for example, *Dolgow v. Anderson, supra*, note 20; *Siegel v. Realty Equities Corp. of New York*, 54 F.R.D. 420 (S.D.N.Y. 1972), at 428; and *Milberg v. Western Pacific Railroad Co.*, 51 F.R.D. 280 (S D.N.Y. 1970), at 282. See, also, Note, *supra*, note 31, at 737, *n.* 41.

[36] See *Eisen v. Carlisle & Jacquelin, supra*, note 21.

[37] See, for example, Comment, "Notice, Preliminary Hearings, and Manageability in Federal Class Actions" (1974), 11 Houston L. Rev. 121; Note, "*Eisen v. Carlisle & Jacquelin* – Fluid Recovery, Minihearings and Notice in Class Actions" (1974), 54 B.U. L. Rev. 111; Blecher, "Is the Class Action Rule Doing the Job? (Plaintiff's Viewpoint)", 55 F.R.D. 365 (1973), at 368-70; Note, "Use of a Preliminary Hearing in a 23(b)(3) Class Action", [1972] Wash. U. L.Q. 588, at 591-93. See, also, United States Department of Justice, Office for Improvements in the Administration of Justice, *H.R. 5103 - Bill Commentary: The Case for Comprehensive Revision of Federal Class Damage Procedure* (July 25, 1979); "Responses to the Rule 23 Questionnaire of the Advisory Committee on Civil Rules" (1978), 5 C.A.R. 3, at 24; and Harvard Developments, *supra*, note 2, at 1418-19.

In addition, in a draft statute being considered by a Committee of the Litigation Section of the American Bar Association, which at present is reviewing Rule 23 of the United States Federal Rules of Civil Procedure, a preliminary merits test is included: see American Bar Association, Section of Litigation, *Proposed Class Action Legislation* (tentative draft, May 1980), §3002(b)(2).

[38] See Draft Bill, s. 3(3)(*a*).

[39] See *infra*, ch. 10, sec. 2.

recent years, both in Canada and elsewhere, have contained some kind of substantive adequacy test as part of the certification procedure. We turn then to the standard of proof that the representative should be required to meet before the preliminary merits test is satisfied.

3. THE STANDARD OF PROOF

In determining the standard of proof that the representative plaintiff should be required to meet in order to satisfy the proposed preliminary merits test, we have considered a number of tests that are now employed in a variety of analogous circumstances, as well as a number of class action mechanisms containing a preliminary merits test.

(a) The Ontario Precedents

In this section, we shall examine three different standards for a preliminary merits test now employed in Ontario. The tests to be examined are those used on motions for judgment under Rule 58 of the Supreme Court of Ontario Rules of Practice,[40] on motions for leave to commence a derivative suit under section 97 of the *Business Corporations Act*,[41] and on motions for an interlocutory injunction pursuant to section 19(1) of the *Judicature Act*.[42]

(i) Motions for Judgment under Rule 58 of the Supreme Court of Ontario Rules of Practice

Rule 58 of the Rules of Practice provides, in part, as follows:

> 58.-(1) Where the defendant files an appearance to a writ specially endorsed and delivers an affidavit of merits, the plaintiff may either move for judgment, or cross-examine upon such affidavit and thereafter move for judgment.
>
> (2) On any such motion, where the court is satisfied that the defendant has not a good defence to the action or has not disclosed such facts as may be deemed sufficient to entitle him to defend the action, judgment may be given for the plaintiff.

Although the Rule speaks of the court being satisfied "that the defendant has not a good defence to the action or has not disclosed such facts as may be deemed sufficient to entitle him to defend the action", the issue before the court on a Rule 58 application has been stated in terms of whether the defendant has raised a triable issue.[43] In answering this question, the courts

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[40] *Supra*, note 13.

[41] *Supra*, note 32.

[42] *Supra*, note 33.

[43] See Williston and Rolls, *supra*, note 14, Vol. 1, at 304-09, and Holmested and Gale, *supra*, note 14, at 802-04.

have not hesitated to canvass questions both of law and of fact;[44] however, the courts generally exercise great caution under the Rule to ensure that no party is denied his day in court.[45]

(ii) Motions for Leave to Commence a Derivative Suit under Section 97 of the *Business Corporations Act*

In Ontario, a derivative action, which may be characterized as a form of representative action, is brought pursuant to section 97 of the Ontario *Business Corporations Act*. Section 97(1) of the Act provides as follows:

> 97.-(1) Subject to subsection (2), a shareholder of a corporation may maintain an action in a representative capacity for himself and all other shareholders of the corporation suing for and on behalf of the corporation to enforce any right, duty or obligation owed to the corporation under this Act or under any other statute or rule of law or equity that could be enforced by the corporation itself, or to obtain damages for any breach of any such right, duty or obligation.

Subsection (2) of section 97 provides that, before an action is commenced under this section, the permission of the court must be secured. Under section 97(3)(*c*), the court may grant leave only if it is satisfied that "the shareholder is acting in good faith and it is *prima facie* in the interests of the corporation or its shareholders that the action be commenced".[46] These words have not yet received a great deal of judicial attention. Nonetheless, from the existing case law, it would appear that the standard to be met on an application for leave to commence a derivative action is not too onerous. For example, in the case of *Re Marc-Jay Investments Inc. and Levy*,[47] O'Leary J. commented that the function of a judge on an application for leave to commence such an action is to deny the application "if it appears that the intended action is frivolous or vexatious or is bound to be unsuccessful".[48] O'Leary J. concluded that, if the action "could reasonably succeed",[49] and all the other conditions for the bringing of a derivative suit have been satisfied, leave should be granted. The test enunciated by O'Leary J. was applied by Cory J. in the more recent case of *Armstrong v. Gardner*.[50] Interestingly, in *Re Northwest Forest*

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[44] See, for example, *Weinberg v. Elliott Hotel Ltd.*, [1960] O.W.N. 233 (C.A.), and *Concrete Credit Agency v. Emdale Construction Ltd.*, [1963] 2 O.R. 623 (Master S.C.O.).

[45] See Williston and Rolls, *supra*, note 14, Vol. 1, at 307, and Holmested and Gale, *supra*, note 14, at 808-09.

[46] The other conditions that must be satisfied before leave to commence a derivative action can be given are that "the shareholder was a shareholder of the corporation at the time of the transaction or other event giving rise to the cause of action" (s. 97(3)(a)) and that "the shareholder has made reasonable efforts to cause the corporation to commence or prosecute diligently the action on its own behalf" (s. 97(3)(b)).

[47] *Re Marc-Jay Investments Inc. and Levy* (1974), 5 O.R. (2d) 235, 50 D.L.R. (3d) 45 (H.C.J.) (subsequent references are to (1974), 5 O.R. (2d)).

[48] *Ibid.*, at 237.

[49] *Ibid.*

[50] (1978), 20 O.R. (2d) 648 (H.C.J.).

Products Ltd.,[51] a case concerned with leave to bring a derivative action pursuant to the British Columbia *Companies Act*,[52] Cashman L.J.S.C. held that section 222(3)(*c*) of that Act (stating that the action for which leave is sought must be "prima facie in the interests of the company"), did not require the applicants to prove a *prima facie* case on the merits. The language of section 222(3)(*c*), quoted above, is identical to that found in section 97(3)(*c*) of the Ontario *Business Corporations Act*.

(iii) Motions for Interlocutory Injunctions

Perhaps the best example under the present law of a preliminary merits test is that employed by courts on an application for an interlocutory injunction. Traditionally, on such an application, the first question a court would ask is whether the applicant has demonstrated a strong *prima facie* case.[53] However, as a result of the recent decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*,[54] which sought to de-emphasize the importance of the merits of the applicant's claim, the law in this area is somewhat uncertain at the present time.[55] Under the *American Cyanamid* doctrine, the first question to be considered is whether "there is a serious question to be tried", with the emphasis on the issue of the balance of convenience to the parties.[56] Only if the court finds that the balance of

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[51] [1975] 4 W.W.R. 724 (B.C.S.C.).

[52] S.B.C. 1973, c. 18, s. 222. See now s. 225 of the *Company Act*, R.S.B.C. 1979, c. 59.

[53] See Sharpe, "Interlocutory Injunctions: The Post-American Cyanamid Position", in Gertner (ed.), *Studies in Civil Procedure* (1979) 185, at 188.

[54] *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504 (H.L.) (subsequent references are to [1975] A.C.). For a discussion of the cases decided since *American Cyanamid*, see Gray, "Interlocutory Injunctions since Cyanamid" (1981), 40 Camb. L.J. 307.

[55] For a detailed examination of the present law in Ontario, see Sharpe, *supra*, note 53. See, also, Hammond, "Interlocutory Injunctions: Time for a New Model?" (1980), 30 U. Toronto L.J. 240.

[56] *Supra*, note 54, at 407, *per* Lord Diplock. Sharpe, *supra*, note 53, at 192, comments on the balance of convenience test as follows (footnotes omitted):

> Under the rubric of 'balance of convenience', the courts have considered an indefinable array of elements. Apart from, and in addition to, the risks of monetary loss and gain, what will be the relative impact upon the parties of granting or withholding the injunction? Does the benefit the plaintiff will gain from preliminary relief outweigh the convenience to the defendant of withholding relief? Is the inconvenience to the defendant, should the injunction be granted, more substantial than the inconvenience the plaintiff will suffer if relief is withheld?
>
> Again, it seems clear that other items on the checklist should influence the weight to be given to balance of convenience. If the plaintiff's case looks very strong, he may well succeed, although the injunction would cause greater inconvenience to the defendant than withholding preliminary relief would cause the plaintiff. On the other hand, where an assessment of the case is impracticable and the damages question balanced, an assessment of balance of convenience will be determinative. It is impossible to develop a precise calculus or calibration of such a question beyond restating the nature of the risk-balancing exercise that is involved.

convenience is not determinative will it test the relative strength of each party's case in deciding whether to grant or refuse the injunction. The merits of the dispute were downplayed by the law lords in the *American Cyanamid* case because they perceived difficulty in deciding this issue on the basis of affidavit or documentary evidence, particularly in cases of great complexity. It should be noted, however, that in England, unlike the situation in Ontario, cross-examination on affidavits is not available as of right.[57]

Moreover, although a number of Ontario courts have followed the decision of the House of Lords in the *American Cyanamid* case,[58] the approach adopted in that case would seem to suffer from the same infirmities as the traditional approach to applications for an interlocutory injunction. Whether the focus of the inquiry on such an application is the strength of the plaintiff's case or the balance of convenience, affidavit evidence will be necessary. In complex cases, it may be equally difficult to decide the balance of convenience issue on the basis of affidavit material. Regardless of which test is employed – and the courts over the years have employed quite different terminology[59] – it is clear that the courts recognize the importance of some preliminary merits test, especially in view of the consequences of granting an application for an interlocutory injunction.

Significantly, it was to the analogy presented by applications for interlocutory injunctions that the federal courts in the United States turned in fashioning a test on the merits in certification hearings for class actions. The Court in *Dolgow v. Anderson*,[60] for example, specifically referred to the precedent of interlocutory injunctions in formulating its test on the merits. Although the United States Supreme Court ultimately rejected the use of a preliminary merits test in the context of Rule 23,[61] courts in the United States have not hesitated to inquire into the merits of an action when necessary on applications for interlocutory injunctions.[62] This, then, is a convenient point at which to turn our attention to the various tests proposed in the class action context.

(b) The Class Action Precedents

Rule 23 of the United States Federal Rules of Civil Procedure does not contain a merits test of any kind, and judicial authority in respect of this Rule is clearly against any right on the part of the courts to examine the merits of a

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[57] See the English Rules of the Supreme Court 1965, Ord. 38, r. 2(3).

[58] See Sharpe, *supra*, note 53.

[59] *Ibid.*, at 188, *n.* 11.

[60] *Supra*, note 20.

[61] The United States Supreme Court, in *Eisen v. Carlisle & Jacquelin*, *supra*, note 21, rejected the approach adopted by the Court in *Dolgow v. Anderson*. The Supreme Court held that Rule 23 of the United States Federal Rules of Civil Procedure does not require an inquiry into the merits of a class action or authorize such an inquiry on the application for court approval to maintain an action in class form.

[62] See Leubsdorf, "The Standard for Preliminary Injunctions" (1978), 91 Harv. L. Rev. 525.

class action during the certification application.[63] However, the majority of class action mechanisms modelled after Rule 23, and proposed in recent years, do contain some kind of merits test. In this section, we shall examine the merits tests contained in the following mechanisms: Quebec's recently enacted class action legislation;[64] the class action proposals contained in the proposed *Competition Act*, Bills C-42 and C-13;[65] the consumer class action statute proposed by Professor Williams;[66] the Draft Bill for a Class Actions Act proposed by the Law Reform Committee of South Australia;[67] and Bill H.R. 5103[68] put forward by the Office for Improvements in the Administration of Justice of the United States Department of Justice.

(i) Quebec

In 1978, the Quebec *Code of Civil Procedure* was amended to include a comprehensive and detailed class action mechanism.[69] Under article 1003(b) of the Quebec *Code of Civil Procedure*, as amended, the court may authorize the bringing of a class action only if it is of the opinion, *inter alia*, that "the facts alleged seem to justify the conclusions sought". In the recent case of *Le Comité Régional des Usagers des Transports en commun de Québec -c.- La Commission des Transports de la Communauté Urbaine de Québec*,[70] the Supreme Court of Canada had occasion to interpret article 1003. In that case, a class action was brought on behalf of all persons holding transport passes for the month of January 1979 against the defendant for damages resulting from an illegal strike. In deciding whether the action satisfied the requirements of article 1003, Chouinard J., speaking for the Court, remarked that "the phrase 'seem to justify' means that there must be in the judge's view a good colour of right in order for him to authorize the action, though he is not thereby required to make any determination as to the merits in law of the conclusions, in light of the facts alleged".[71] It is not clear from this passage whether article 1003(b) requires the court to do anything but determine

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[63] See *Eisen v. Carlisle & Jacquelin, supra*, note 21.

[64] See the *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, arts. 999-1051, as enacted by S.Q. 1978, c. 8, s. 3 (hereinafter referred to as "C.C.P.").

[65] *An Act to Amend the Combines Investigation Act*, Bill C-42, 1977 (30th Parl. 2d Sess.), and *An Act to Amend the Combines Investigation Act*, Bill C-13, 1977 (30th Parl. 3d Sess.).

[66] See Williams, "Model Consumer Class Actions Act", in "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 65 (hereinafter referred to as "Williams' Model Act").

[67] See Law Reform Committee of South Australia, "Draft Bill for a Class Actions Act", in *Thirty-sixth Report Relating to Class Actions* (1977), at 12.

[68] Small Business Judicial Access Act of 1979, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill H.R. 5103, 96th Cong., 1st Sess. (1979) (hereinafter referred to as "O.I.A.J. Bill H.R. 5103").

[69] See *supra*, note 64.

[70] Unreported (May 11, 1981, S.C.C.).

[71] *Ibid.*, at 6.

whether the facts alleged give rise to a legal remedy. As in the case of Rule 126 of the Supreme Court of Ontario Rules of Practice, the facts may be deemed to be capable of proof, thereby circumventing any dispute by the defendant of any of the facts.

(ii) Williams' Proposed Model Consumer Class Actions Act

In a 1975 article,[72] in which he advocated the introduction of a consumer class action mechanism, Professor Williams proposed that a court should permit a class action to proceed only if it is satisfied that the "action is brought in good faith and appears to have merit".[73] Commenting on this particular aspect of his class action mechanism, Professor Williams remarked as follows:[74]

> With regard to the requirement of showing merit, it is appropriate to analogize from the test applied in Canadian jurisdictions which allow a plaintiff to obtain a speedy judgment without a full hearing. The defendant can avoid summary judgment by showing that he has an arguable defence. . . . Applying this test to the question of apparent merit, the plaintiff need not demonstrate conclusively that on both the law and the facts the claim will succeed. These are matters for the judge at trial to determine. It should be sufficient for the plaintiff to show that on contentious points of law the claim is reasonably arguable and, if the facts are in dispute, that there is a reasonable prospect that the trial court will find them for him. For questions of law, the test is essentially the same as that applied when the defendant moves to strike out a statement of claim for not disclosing a cause of action. The court will not grant the motion unless the pleading is bad beyond argument.

In another context, Professor Williams expressed his views of the "appears to have merit" test as follows:[75]

> Opponents of the scheme will contend that the requirement of apparent merit is not sufficiently stringent and that many actions that meet the test will nonetheless be defeated at trial, leaving the defendant to carry the costs of its successful defence. To impose any stricter standard on the plaintiff, however, would make the preliminary inquiry virtually the trial of the action, and thus defeat the purpose of the procedure . . . .

(iii) South Australia

In the class actions statute appended to its 1977 *Thirty-sixth Report Relating to Class Actions*, the Law Reform Committee of South Australia seems to have adopted Professor Williams' suggestion respecting a preliminary merits test. Section 3(3)(*a*) of the Draft Bill provides:

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[72] See Williams, "Consumer Class Actions in Canada - Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1.

[73] Williams' Model Act, *supra*, note 66, s. 3(3)(c).

[74] *Supra*, note 72, at 73.

[75] See Williams, "Damages Class Action under the Combines Investigation Act", in Williams and Whybrow, *A Proposal for Class Actions Under Competition Policy Legislation* (1976), at 84.

> 3.-(3) The Court shall order that the action is to be maintained as a class action . . . if in the opinion of the Court –
>
> (*a*) the action is brought in good faith and appears to have merit; . . .

The Report contains no discussion of this particular provision of the Draft Bill.

(iv) The Proposed *Competition Act*

In recent years, there have been a number of attempts to amend the federal *Combines Investigation Act*, two of which have included a proposed class action mechanism along the lines of Rule 23 of the United States Federal Rules of Procedure. Under both Bill C-13[76] and an earlier version, Bill C-42,[77] a court would have been empowered to authorize the maintenance of a class action if it found, *inter alia*, that "the proceedings are brought in good faith on the basis of a *prima facie* case". Interestingly, in a study of the federal *Combines Investigation Act* published shortly before the introduction of these two Bills, the "*prima facie* case" test seems to have been equated with an "appears to have merit" test.[78] In our opinion, however, these tests are quite different. Whereas a "*prima facie* case" test seems to oblige the court to come to some conclusion concerning the likelihood of eventual success in the action, an "appears to have merit" test imposes a somewhat lower standard.

(v) O.I.A.J. Bill H.R. 5103

Under section 3022(b)(2) of Bill H.R. 5103, proposed by the Office for Improvements in the Administration of Justice of the United States Department of Justice, a court would be required to make a positive finding that "there are sufficiently serious questions going to the merits to make them fair grounds for litigation"[79] before allowing a class action to proceed. In explanatory material accompanying Bill H.R. 5103, the basis for the "sufficiently serious questions" test was outlined as follows:[80]

> The 'serious question' language is derived from a portion of a Second Circuit preliminary injunction test. The bill language is not as demanding as the 'reasonable likelihood of success' on the merits standard. It is sufficient that 'vast and intricate problems of fact and law [are involved] . . . which cannot be fairly resolved short of . . . a trial . . . .' The 'serious questions' test can be met with limited discovery.

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[76] *Supra*, note 65, s. 39.12(2)(*d*).

[77] *Ibid.*, s. 39.12(2)(*d*).

[78] Williams, *supra*, note 75, at 84.

[79] For an earlier Senate version of O.I.A.J. Bill H.R. 5103, see A Bill To provide for reform of class action litigation procedures, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill S. 3475, 95th Cong., 2d Sess. (1978). The same preliminary merits test is employed there: see §3022(b)(2).

[80] United States Department of Justice, Office for Improvements in the Administration of Justice, *H.R. 5103 - Bill Commentary: The Case for Comprehensive Revision of Federal Class Damage Procedure* (July 25, 1979), at 53-54 (footnotes omitted).

It is interesting to note that, in proposing a "sufficiently serious questions" test, Bill H.R. 5103 rejected the test articulated in *Dolgow v. Anderson*,[81] one of the early American cases under Rule 23 advocating a preliminary merits test. The test applied in *Dolgow* was phrased in terms of whether there was a substantial possibility that the action would prevail on the merits. It may be that the sponsors of Bill H.R. 5103 were convinced by the detractors of the *Dolgow* test that it imposed too high a standard for the representative plaintiff to meet at a preliminary stage in the proceedings: the representative plaintiff likely would have enormous difficulties in obtaining sufficient information and evidence at an early stage in the proceedings to meet such a test.[82]

4. THE COMMISSION'S PROPOSED PRELIMINARY MERITS TEST

The Commission has given careful consideration to the various preliminary merits tests described in the preceding section. We have, however, rejected these alternatives in favour of a somewhat different merits test. The Commission recommends that, before it permits an action to be maintained as a class action, the court on the certification application should be required to find that the action has been brought in good faith and that there is a reasonable possibility that material issues of fact and law common to the class will be resolved at trial in favour of the class.[83] The decision of the court should be based on the material before it, and not on speculation about what evidence might come to light at some later point in the proceedings in support of the allegations made by the representative plaintiff. The reasoning behind this recommendation is as follows.

The principal purpose of this preliminary merits test is to weed out unmeritorious class actions, thereby assuaging the concerns of those who believe that class actions will be used to "blackmail" defendants, and to ensure that the exceptional features of the proposed class action procedure will be employed only in cases with apparent merit. As we stated earlier, we are fully cognizant that, in some cases, where the proposed preliminary merits test cannot be satisfied, class members will effectively be denied their day in court. This almost invariably will be the result where the claims in question are individually nonrecoverable. Nevertheless, we believe that the reasons given in support of a preliminary merits test outweigh this concern.

The test that we propose is not aimed at those cases where it is clear that the action cannot succeed. These cases can be dealt with under Rule 126 of the present Supreme Court of Ontario Rules of Practice, and its equivalent in the proposed rules of civil procedure.[84] At the same time, the Commission is concerned about imposing a standard that would be too high – in other

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[81] *Supra*, note 20.

[82] See, for example, Moore, "The A.B.A., The Congress and Class Actions: A Report" (1974), 3 C.A.R. 36, at 47-49.

[83] See Draft Bill, s. 3(3)(*a*).

[84] See *supra*, note 18.

words, one that would have the effect of disqualifying the vast majority of suits commenced as class actions.[85] To ensure that our proposed class action procedure is truly useful, it must be available in a wide variety of circumstances. The preliminary merits test that we propose would require a standard of proof that is not as strict as a *prima facie* case test, but more than simple proof that a triable issue exists. We are satisfied that our preliminary merits test strikes a reasonable balance.

Recommendation

The Commission makes the following recommendation:

As a precondition to the certification of an action as a class action, the court should be required to find that the action is brought in good faith and that there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class.

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[85] This was the view taken by some in respect of the preliminary merits test included in the proposed new combines investigation legislation. It will be recalled that the test in Bill C-13, s. 39.12(2)(*d*) was that "the proceedings are brought in good faith on the basis of a *prima facie* case". One member of the House of Commons Standing Committee on Finance, Trade and Economic Affairs commented as follows on the preliminary merits test contained in Bill C-42, which was identical to that found in Bill C-13:

> It would seem to me that the small businessman, the kind of firm or individual who is a member of your association, [the Canadian Federation of Independent Business], would be particularly apt to benefit from the class action proposals in the legislation, particularly if, as I think is the case, there are provisions in it to protect defendants against frivolous or harassing types of action. In fact, there are those like myself who have argued that the wording of the present bill is already so tight that some quite justifiable actions might not be able to proceed, because of the wording.

See Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, 1976-77 (30th Parl. 2d Sess.), Issue No. 64, at 28-29.

However, it was suggested in the Canadian Federation of Independent Business' written submissions to the Committee, and by the Federation's consultant, Mr. Troughton, that only a full preliminary hearing modelled after the one in present use in criminal proceedings, and with the same burden of proof operating, could effectively safeguard against frivolous class actions, and that Bill C-42 did not guarantee a hearing of such magnitude. See Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, 1976-77 (30th Parl. 2d Sess.), Issue No. 64A, at 16, and Issue No. 64, at 31, respectively.

Note, also, the Independent Petroleum Association of Canada's objections to s. 39.12(2)(*d*) as set out in its written submissions to the Committee:

> Subparagraph 39.12(2)(*d*) may also be intended as a protection against frivolous actions. Its equivalent is not found in U.S. Federal Rule 23. In most instances the court should have little reason not to find that the proceedings are brought 'in good faith on the basis of a prima facie case'. It would be most difficult to show that the plaintiff was not acting in good faith. A prima facie case at most means the presentation of facts which would call upon the accused for an explanation. Judges tend, and properly, to be reluctant to refuse anyone a hearing. Few class action applications would be denied by reason of this subparagraph.

See Minutes of the Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, 1976-77 (30th Parl. 2d Sess.), Issue No. 53A, at 28.

CHAPTER 8

CERTIFICATION: NUMEROSITY, COMMONALITY, ADEQUACY OF REPRESENTATION, AND TYPICALITY

1. INTRODUCTION

In the preceding chapter, the Commission recommended that the substantive adequacy of class actions should be tested at an early stage in the proceedings by means of a preliminary merits test. In this chapter, we turn our attention from the substantive adequacy of class actions to their formal adequacy.

The class action precedents that the Commission has examined suggest a number of formal prerequisites to certification. For example, the size of the class on whose behalf an action is brought may be relevant to a determination whether a particular claim is appropriate for class treatment. The ability of the representative plaintiff to protect the interests of class members also may be an important consideration for any such determination. Another important matter to which the certifying judge's attention perhaps should be drawn is the existence or non-existence of questions of fact or law that are common to all the members of the class on whose behalf the class action has been brought. Whether the size of the class (numerosity), the adequacy of the representative plaintiff (adequacy of representation), or the existence of common questions (commonality) should be preconditions to certification of a class action is the question to be considered here. In addition, the Commission will consider a fourth formal prerequisite to the certification of class actions, a "typicality" requirement, common to the Rule 23 family of class action provisions, which requires proof that "the claims of representative parties are typical of the claims . . . of the class". We begin our examination of the formal requirements for the bringing of class actions with a discussion of the numerosity issue.

2. NUMEROSITY

(a) The Present Law

Rule 75 of the Supreme Court of Ontario Rules of Practice,[1] the existing

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[1] R.R.O. 1980, Reg. 540.

class action Rule, permits the bringing of a class action where there are "numerous persons having the same interest". This numerosity requirement has not posed any particular difficulty. It is clear that, in order to bring a class action, there must be more than one person in the class, for there "cannot be a representative without a constituency".[2] While, theoretically, the minimum number of class members for the bringing of a class action is two, there have been cases suggesting that the numerosity requirement of Rule 75 is not satisfied by a class of two, four, or five members. For example, Laycraft J., in *Goodfellow v. Knight*,[3] doubted whether a class of four constituted a group of numerous persons under Rule 42 of the Alberta Rules of Court,[4] the equivalent of Rule 75 of the Ontario Rules of Practice. His Lordship went on to add that "[n]othing in the rule indicates that the word 'numerous' is to be taken in any sense other than its usual meaning as describing a group consisting of many individuals".[5] Insofar as the maximum size of a class for the purposes of Rule 75 is concerned, this issue does not seem to have troubled the courts to any great extent. In Ontario, for example, a class action has been sanctioned where the class consisted of some 180,000 members.[6]

(b) The Need for a Numerosity Requirement

There would seem to be little doubt about the wisdom of including a numerosity requirement in any revised class action procedure. After all, fundamental to the concept of class actions is the idea that there has been a mass wrong and that relief in the form of a mass remedy is sought. In other words, the procedure is designed "to avoid the inconvenience of having many parties to the action",[7] and to provide access to the legal system to a group of persons with small claims.[8] A numerosity requirement is simply a method of ensuring that these twin purposes of class actions are served. Accordingly, we are convinced of the need for numerosity in every class action. We turn then

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[2] *Wilson v. Church* (1878), 9 Ch. D. 552, at 559, 39 L.T. 413 (C.A.).

[3] *Goodfellow v. Knight* (1977), 5 A.R. 573, 2 C.P.C. 209 (S.C., T.D.) (subsequent references are to 2 C.P.C.). See, also, *In Re Braybrook*, [1916] W.N. 74, 60 Sol. Jo. 307 (Ch. D.) (five). In these two cases, the actions were not allowed to continue in class form. And see *Vizhgorodsky v. Kontonovich*, unreported (January 7, 1982, Master S.C.O.), where an application to amend the style of cause and convert the action into a class action on behalf of two persons was dismissed. Compare *Trustees, Executors and Agency Co. Ltd. v. Sparling* (1894), 16 A.L.T. 34 (Vic. S.C.) (five), and *Eighth Union Bldg. Society v. Carnegie* (1893), 19 V.L.R. 388 (S.C.) (four).

[4] Alta. Reg. 390/68 as amended.

[5] *Goodfellow v. Knight, supra*, note 3, at 216.

[6] See *Cobbold v. Time Canada Ltd.* (1976), 13 O.R. (2d) 567, 71 D.L.R. (3d) 629 (H.C.J.). The action was dismissed at trial: (1980), 28 O.R. (2d) 326, 109 D.L.R. (3d) 611 (H.C.J.).

[7] *Goodfellow v. Knight, supra*, note 3, at 216.

[8] See the remarks of Arnup J.A. in *Naken v. General Motors of Canada Ltd.* (1978), 21 O.R. (2d) 780, at 784-85, 92 D.L.R. (3d) 100 (C.A.), to this effect. Recognition of the importance of access to the administration of justice by persons with small claims is also evident in the comments of Grange J. in a recent nonclass action case: see *Rajakaruna v. Air France* (1979), 25 O.R. (2d) 156, at 157-58, 11 C.P.C. 172 (H.C.J.).

to consider the specific numerosity requirement that should form part of our proposed class action procedure.

(c) Alternatives to the "Numerous Persons" Requirement of Rule 75

(i) Rule 23 of the United States Federal Rules of Civil Procedure

Given the fact that, in designing an expanded class action procedure for Ontario, we have been greatly influenced by Rule 23 of the United States Federal Rules of Civil Procedure,[9] it would seem appropriate to look first at the numerosity requirement contained in that Rule. Rule 23(a)(1) prescribes, as a precondition to the maintenance of a class action, the existence of a class that "is so numerous that joinder of all members is impracticable". The most significant aspect of this provision is the fact that, unlike Rule 75, numerosity is tied to the issue of joinder.

The cases concerned with Rule 23(a)(1) reflect the view that numbers alone should not be the controlling factor,[10] except perhaps where there are so few members in the class that joinder is clearly possible. The prevailing view is well reflected in the following comments of Judge Waterman in *Demarco v. Edens*:[11]

> [C]ourts should not be so rigid as to depend upon mere numbers as a guideline on the practicability of joinder; a determination of practicability should depend on all the circumstances surrounding a case.

Among the factors that the courts have considered relevant to the impracticability of joinder issue are the size of the claims and the financial resources of members of the class,[12] as well as the location of class members and the extent to which they are dispersed throughout the state or country,[13] as the case may be. Insofar as proof of the size of the class is concerned, while the courts are not prepared to give credence to merely speculative or conclusory statements

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[9] Fed. R. Civ. P. 23, promulgated at 383 U.S. 1029 (1966).

[10] See *Gay v. Waiters' and Dairy Lunchmen's Union*, 549 F.2d 1330 (9th Cir. 1977); *Davy v. Sullivan*, 354 F. Supp. 1320 (M.D. Ala. 1973); and *Swanson v. American Consumer Industries, Inc.*, 415 F. 2d 1326 (7th Cir. 1969). See, generally, Newberg, *Newberg on Class Actions* (1977), Vol. 1, §1105, at 171 *et seq.*

[11] 390 F.2d 836 (2d Cir. 1968), at 845. See, also, *Cypress v. Newport News General and Nonsectarian Hospital Ass'n*, 375 F.2d 648 (4th Cir. 1967); *Barnes v. Board of Trustees, Michigan Veterans Trust Fund*, 369 F. Supp. 1327 (W.D. Mich. 1973); and *Dale Electronics, Inc. v. R.C.L. Electronics, Inc.*, 53 F.R.D. 531 (D.N.H. 1971).

[12] See Donelan, "Prerequisites to a Class Action under Rule 23" (1968-69), 10 B.C. Ind. & Comm. L. Rev. 527, at 531. See, also, *In re Fine Paper Antitrust Litigation*, 82 F.R.D. 143 (E.D. Pa. 1979).

[13] See *Ewh v. Monarch Wine Co., Inc.*, 73 F.R.D. 131 (E.D.N.Y. 1977), and *Fuzie v. Manor Care, Inc.*, 461 F. Supp. 689 (N.D. Ohio 1977), as well as the cases listed in Wright and Miller, *Federal Practice and Procedure* (1972), Vol. 7, §1611, at 119, *n.* 31.

concerning class size,[14] evidence of the exact size of the class is not demanded.[15]

In spite of the fact that the numerosity requirement of Rule 23 has not given rise to controversy, recent efforts to reform class action procedures in the United States have not left this area untouched. The following section is devoted to an examination of the manner in which both the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act,[16] and Bills S. 3475[17] and H.R. 5103,[18] proposed by the Office for Improvements in the Administration of Justice of the United States Department of Justice, have dealt with this issue.

(ii) Magnuson-Moss Warranty – Federal Trade Commission Improvement Act and O.I.A.J. Bills S. 3475 and H.R. 5103

Unlike Rule 23 of the United States Federal Rules of Civil Procedure, where there need be only one named plaintiff, the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act requires that a class action brought in the federal courts pursuant to that statute must name at least 100 plaintiffs.[19] The need to name 100 plaintiffs imposes obvious limitations on the use of the class action mechanism in respect of claims under the Act. Moreover, such a requirement raises the spectre of solicitation by the class representative's lawyer to fill out the list of 100 named plaintiffs.[20]

In addition to these two problems with the numerosity requirement of the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, other objections may be raised. For example, all 100 named plaintiffs would be subject to discovery at the behest of the defendant. This fact alone may make it difficult to find 100 persons willing to be named as plaintiffs in the suit. Finally, to the extent that the numerosity and other jurisdictional

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[14] See *Sims v. Parke Davis & Co.*, 334 F. Supp. 774 (E.D. Mich. 1971), aff'd 453 F.2d 1259 (6th Cir. 1971); *Holloway v. Parham*, 340 F. Supp. 336 (N.D. Ga. 1972); *Valentino v. Howlett*, 528 F.2d 975 (7th Cir. 1976); and *Wheeler v. Anchor Continental, Inc.*, 80 F.R.D. 93 (D.S.C. 1978).

[15] See *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968); *In re Home-Stake Production Co. Securities Litigation*, 76 F.R.D. 351 (N.D. Okla. 1977); and *Ligon v. Frito-Lay, Inc.*, 82 F.R.D. 42 (N.D. Tex. 1979).

[16] 15 U.S.C. §§2301-2312.

[17] A Bill To provide for the reform of class action litigation procedures, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill S. 3475, 95th Cong., 2d Sess. (1978) (hereinafter referred to as "O.I.A.J. Bill S. 3475").

[18] Small Business Judicial Access Act of 1979, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill H.R. 5103, 96th Cong., 1st Sess. (1979) (hereinafter referred to as "O.I.A.J. Bill H.R. 5103").

[19] *Supra*, note 16, §2310(d)(3)(C). It is interesting to note that this restriction does not apply to actions under the Act brought in state courts: see (1975), 4 C.A.R. 415.

[20] For the rule in Ontario regarding solicitation, see The Law Society of Upper Canada, *Professional Conduct Handbook* (1978), r. 13, as amended, and the accompanying commentary. See, generally, Orkin, *Legal Ethics* (1957), at 177 *et seq.*

requirements of the Act[21] are intended to eliminate "trivial or insignificant actions being brought as class actions in the federal courts",[22] the 100 named plaintiffs prerequisite would seem to be unnecessary and restrictive. The preliminary merits test that we have recommended is, in our view, sufficient to eliminate those cases where there is substantial doubt about the eventual success of the action.[23]

The Bills proposed in recent years by the Office for Improvements in the Administration of Justice of the United States Department of Justice for reform of class action procedures adopted a substantially different approach to the numerosity question. In each case, insofar as the private compensatory class action mechanism is concerned,[24] a minimum class size of forty or more named or unnamed persons, each with a claim in excess of $300, was prescribed.[25] In the case of public class actions, a minimum requirement of 200 named or unnamed class members, each with a claim not exceeding $300, was imposed.[26] If these Bills had become law, public class actions would have been restricted in another important way. In addition to the requirement that the individual claims not exceed $300, section 3001(a)(2) of Bill S. 3475, and section 3001(a)(1)(B) of Bill H.R. 5103, imposed the further requirement that "the combined amount of the injury . . . exceeds $60,000". Just as we consider the restrictions under the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act to be unduly restrictive, so, in our view, would the numerosity and related requirements of Bills S. 3475 and H.R. 5103 reduce the flexibility of our proposed class action procedure. However, one aspect of the numerosity requirement in Bills S. 3475 and H.R. 5103 is worth noting; that is, unlike Rule 23, there is no reference in the relevant sections to the alternative of joinder. This is a matter to which we shall return below.

(d) The Commission's Proposed Numerosity Requirement

For two reasons, the Commission has concluded that the "numerous persons" requirement of Rule 75 of the Supreme Court of Ontario Rules of

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[21] The Magnuson-Moss Warranty – Federal Trade Commission Improvement Act also contains a number of other important provisions that limit the use of the Rule 23 class action procedure. In order to bring an action for breach of this statute in the federal courts, two additional conditions must be satisfied. First, all individual claims must be for an amount equal to or greater than $25. Secondly, the aggregate of the claims in any suit brought pursuant to the Act must be equal to or greater than $50,000: see *supra*, note 16, §2310(d)(3)(A) and (B).

[22] See House Comm. on Interstate and Foreign Commerce, H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. (1974), in 4 U.S. Code Cong. and Ad. News 7702 (1974), at 7724.

[23] See *supra*, ch. 7, sec. 4.

[24] It will be recalled that the Bills envisaged both a public class action mechanism and a private or compensatory class procedure. For a discussion of the structure of these Bills, see *supra*, ch. 6, sec. 1(a)(iv).

[25] O.I.A.J. Bill S. 3475, *supra*, note 17, §3011(a)(1), and O.I.A.J. Bill H.R. 5103, *supra*, note 18, §3011(a)(1).

[26] O.I.A.J. Bill S. 3475, *supra*, note 17, §3001(a)(1), and O.I.A.J. Bill H.R. 5103, *supra*, note 18, §3001(a)(1)(A).

Practice should be retained and should form a component part of the new class action procedure proposed by the Commission. First, we are satisfied that the "numerous persons" language of Rule 75 has not given rise to any problems whatsoever. Consequently, unless there is a good reason to adopt some other test, we see no need to alter the law.

Secondly, the existing and proposed alternatives to the present "numerous persons" test, in our opinion, have substantial drawbacks. The Magnuson-Moss Warranty – Federal Trade Commission Improvement Act requirement of 100 named class members would give rise in some cases to serious practical difficulties; for example, where the potential class members are unknown to each other and widely dispersed, it may be difficult, if not impossible, to find the requisite number of persons willing to be named as plaintiffs in a class action. The obstacle presented by such a requirement, we believe, would constitute a formidable hurdle to the bringing of class actions in many cases where this is the only practical way in which relief can be secured. As we have observed, even the less onerous numerosity requirements of Bills S. 3475 and H.R. 5103 may not provide the desired flexibility for a general class action procedure such as we propose.

The only other alternative, then, to the existing test under Rule 75 is the "so numerous that joinder of all members is impracticable" prerequisite of Rule 23 itself. This approach to the numerosity question is not unknown in Canada. For example, in the case of *Goodfellow v. Knight*,[27] an action brought in class form pursuant to the Alberta equivalent of Rule 75 of the Supreme Court of Ontario Rules of Practice, Laycraft J. commented that "naming each of the members of the firm as plaintiffs would in this case be a simpler procedure than the representative action".[28] The statutory class action mechanism recently introduced in Quebec also ties numerosity to the question of joinder.[29] Finally, the Bills[30] introduced in 1977 to amend the *Combines Investigation Act*[31] contained a provision similar to Rule 23(a)(1) of the United States Federal Rules of Civil Procedure. Section 39.12(2)(*a*) of both Bills provided as follows:

> 39.12(2) On an application made pursuant to subsection (1), the Court shall order that the proceedings to which the application relates be maintained as a class action if it finds that
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> (*a*) the members of the class purported to be represented by the person or persons who commenced the proceedings are so numerous that joinder of all such members as party plaintiffs is impracticable; . . .

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[27] *Supra*, note 3 and accompanying text.

[28] *Ibid.*, at 216.

[29] *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, art. 1003(c), as enacted by S.Q. 1978, c. 8, s. 3 (hereinafter referred to as "C.C.P.").

[30] *An Act to Amend the Combines Investigation Act*, Bill C-42, 1977 (30th Parl. 2d Sess.) (hereinafter referred to as "Bill C-42"), and *An Act to Amend the Combines Investigation Act*, Bill C-13, 1977 (30th Parl. 3d Sess.) (hereinafter referred to as "Bill C-13").

[31] R.S.C. 1970, c. C-23, as amended.

Even though the type of numerosity requirement found in Rule 23 has met with considerable favour in Canada, we nonetheless have rejected it on the ground that it gives the alternative of joinder inordinate prominence.[32] Tying the issue of numerosity to the question of the procedural alternative of joinder, in our view, would reduce significantly the flexibility of our proposed numerosity test.

A numerosity-joinder test, such as that found in Rule 23 of the United States Federal Rules of Civil Procedure, suffers from another drawback. Practically speaking, joinder is a practical alternative to a class action only in the case of claims that are individually recoverable; joinder is not a feasible alternative insofar as individually nonrecoverable claims are concerned.[33] By definition, it is not economically rational to assert such claims on an individual basis. Consequently, to speak of the practicability of joinder in the case of individually nonrecoverable claims is analytically unsound.

In conclusion, we would point out that, while the numerosity-joinder test does have its advocates in Canada, the "numerous persons" requirement that we favour also has its proponents. Professor Williams, for example, in his Model Consumer Class Actions Act,[34] included as one of the preconditions to certification the requirement that "the class [be] numerous". The Law Reform Committee of South Australia adopted this particular suggestion.[35] Accordingly, for the reasons outlined above, the Commission recommends that the "numerous persons" requirement of Rule 75 of the Supreme Court of Ontario Rules of Practice should be adopted as a prerequisite to certification under the proposed *Class Actions Act*.[36]

3. COMMON QUESTIONS

One of the most persuasive arguments in favour of class actions is that grievances presenting legal or factual issues common to many persons can be resolved more efficiently in one class proceeding than in a series of individual

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[32] This is not to suggest that the possibility of joinder should not be a relevant factor on an application for certification. Rather, we believe that joinder, like other alternative methods of resolving the dispute, should be considered on the certification application in determining whether a class action is the superior means of asserting the claims of the class members. We discuss the superiority requirement for certification in chapter 9 of this Report.

[33] For a discussion of the meaning of the terms "individually recoverable claims" and "individually nonrecoverable claims", see Note, "Developments in the Law – Class Actions" (1976), 89 Harv. L. Rev. 1318, at 1356 (hereinafter referred to as "Harvard Developments").

[34] See Williams, "Model Consumer Class Actions Act", in "Consumer Class Actions in Canada - Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 65, s. 2(1) (hereinafter referred to as "Williams' Model Act").

[35] See Law Reform Committee of South Australia, "Draft Bill for a Class Actions Act", in *Thirty-sixth Report Relating to Class Actions* (1977), at 12, s. 2(1) (hereinafter referred to as "South Australia Draft Bill").

[36] See Draft Bill, s. 3(3)(*b*).

actions. In this section, we shall review briefly the manner in which the present Ontario class action Rule seeks to ensure that this particular objective is achieved. We shall then consider the approach that has been taken to this issue in other jurisdictions. We begin with a look at the existing law in Ontario.

(a) The Law in Ontario

Rule 75 of the Ontario Rules of Practice provides that a class action may be brought "[w]here there are numerous persons having the same interest". Although the "numerous persons" requirement of Rule 75 has given rise to little litigation, the same cannot be said about the "same interest" prerequisite. The meaning of this simple phrase has troubled the courts in Ontario, the rest of Canada, and in England since the turn of the century, when Lord Macnaghten, in *Duke of Bedford v. Ellis*,[37] concluded that a class action was appropriate "[g]iven a common interest and a common grievance . . . if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent".[38] While the "same interest" requirement has been relaxed somewhat in recent years, it was the basis for the former prohibition against class actions where the causes of action of the individual class members were based on separate contracts.[39] The "same interest" requirement is also the source of the disallowance of class actions that require individual assessments of damages in proceedings involving the defendant, as was the case in *Stephenson v. Air Canada*.[40]

Recently, however, a somewhat different interpretation has been given to the "same interest" phrase by the courts. Beginning with the case of *Shaw v. Real Estate Board of Greater Vancouver*,[41] there is a line of authorities that has adopted what may be called the "common success test". In *Shaw*, Bull J.A. was of the opinion that the three part test propounded by Lord Macnaghten, and subsequently adopted by a great many courts, could be reduced to a single principle. Mr. Justice Bull stated this principle as follows:[42]

> [A] class action is appropriate where if the plaintiff wins the other persons he purports to represent win too, and if he, because of that success, becomes entitled to relief whether or not in a fund or property, the others also become likewise entitled to that relief, having regard, always, for different quantitative participations.

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[37] *Duke of Bedford v. Ellis*, [1901] A.C. 1, [1900-03] All E.R. 694 (H.L.) (subsequent references are to [1901] A.C.).

[38] *Ibid.*, at 8.

[39] See *supra*, ch. 2, sec. 2(c)(i)b.

[40] *Stephenson v. Air Canada* (1979), 26 O.R. (2d) 369, 103 D.L.R. (3d) 148, appeal dismissed, unreported (February 10, 1981, C.A.).

[41] (1973), 36 D.L.R. (3d) 250, [1973] 4 W.W.R. 391 (B.C.C.A.) (subsequent references are to 36 D.L.R. (3d)). The action was dismissed at trial: see [1974] 5 W.W.R. 193 (B.C.S.C.).

[42] *Ibid.*, at 254.

This "common success test" has had a favourable judicial reception in Ontario. Significantly, it was cited by the Ontario Court of Appeal in *Naken v. General Motors of Canada Ltd.*,[43] a case in which success on the common questions would not necessarily result in relief for all or, indeed, any of the class members, since each still would be required to show that he had relied on the alleged misrepresentations by the defendant. What is significant about the decision of the Court of Appeal for Ontario in *Naken* is the fact that the "same interest" requirement was interpreted not to preclude the maintenance of a class action where individual questions, such as reliance, have to be determined in subsequent proceedings involving the defendant.

A more liberal view of the "same interest" requirement is also evident in the judgment of Vinelott J. in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.*,[44] a recent English decision. In the opinion of Mr. Justice Vinelott, the "same interest" requirement of Order 15, Rule 12, of the English Rules of the Supreme Court 1965 is satisfied if there exists "a *common ingredient* in the cause of action of each member of the class".[45]

Having examined briefly the way in which the common questions issue is treated under Rule 75, an analysis of the treatment of this matter in other class action mechanisms is in order. Given our preference for a class action procedure similar to Rule 23 of the United States Federal Rules of Civil Procedure, we begin our analysis of the treatment of the common questions issue in other jurisdictions with a discussion of Rule 23 itself.

(b) Common Questions under Rule 23

No discussion of the common questions requirement of Rule 23 is possible without some understanding of the structure of the Rule.[46] Rule 23 describes three types or categories of class action. Subdivision (b) of Rule 23 states as follows:[47]

> 23(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
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> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not

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[43] *Supra*, note 8.

[44] [1980] 2 W.L.R. 339, [1979] 3 All E.R. 507 (Ch.) (subsequent references are to [1979] 3 All E.R.).

[45] *Ibid.*, at 520 (emphasis added).

[46] For a more detailed discussion of this rule, see *supra*, ch. 2, sec. 2(e)(i).

[47] Emphasis added.

> parties to the adjudications or substantially impair or impede their ability to protect their interests; or
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> (2) the party opposing the class has acted or refuses to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) *the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members*, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy . . . .

Of particular interest in the present context is the fact that only in class actions brought under Rule 23(b)(3) must the court find that the common questions predominate over individual questions. Although what may be referred to as the "common questions predominance" requirement does not apply to Rule 23(b)(1) and (2) class suits, they are subject to a "common questions" prerequisite. Subdivision (a) of Rule 23, which applies to all three types of class action described in subdivision (b), does impose, as a condition of the bringing of a class action pursuant to the Rule, a common questions requirement. The provision in question reads as follows:

> 23(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (2) there are questions of law or fact common to the class, . . .

The category of Rule 23 into which a particular class action falls, therefore, will determine whether the action will have to meet both the common questions and common questions predominance requirements, or only the former.

As indicated in chapter 2,[48] the categorization of class actions under Rule 23 not only affects the certification of class actions,[49] but also has important consequences for such issues as notice and the right of class members to exclude themselves from an action that has been certified. Before dealing with our recommendation in respect of commonality, therefore, this would seem to be an appropriate juncture at which to indicate the Commission's views concerning the categorization of class actions.

(i) Categories of Class Actions

In the opinion of the Commission, there is little to be gained by categorizing class actions in a manner similar to Rule 23 of the United States Federal Rules of Civil Procedure. Indeed, our examination of the relevant jurisprudence has convinced us that confusion and uncertainty would result from any such categorization.[50] Not only are the categories not intrinsically unique, but much time and effort has been expended in deciding which category is appropriate in the circumstances of a particular case.

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[48] See *supra*, ch. 2, sec. 2(e)(i).

[49] That is, both the commonality and superiority requirements.

[50] For a detailed description and analysis of the categories of class action set out in subdivision (b) of Rule 23, see Newberg, *supra*, note 10, §§1125-50, at 226 *et seq.*

It would appear from the Rule 23 case law that it is difficult to determine, in a particular case, whether a class action falls into one category or another. Indeed, it has been suggested that many (b)(1) and (b)(2) suits can be characterized as (b)(3) suits as well. While (b)(3) suits are often those in which monetary relief is claimed, there does not appear to be any reason why such relief cannot be claimed in a (b)(1) or (b)(2) suit and, indeed, this has often been the case.[51]

Similarly, although some have contended that a (b)(1) or (b)(2) class is likely to be more cohesive than a (b)(3) class, this generalization would seem to be too broad. For example, it is not unlikely that, in a suit that would ordinarily be considered to fall within Rule 23(b)(3), a pre-existing relationship between the class members might exist, as in the case of a group of employees of a particular employer suing for damages on the grounds of discrimination. Conversely, it is difficult to see what particular cohesiveness there is in a class of consumers bringing suit to enjoin an unconscionable business practice, a situation that would seem to fall under Rule 23(b)(2).

We are fortified in our view of the lack of benefit to be gained from dividing class actions into categories by the fact that most of the recently enacted or proposed class action procedures that can be said to be members of the Rule 23 family of class actions have not followed Rule 23 in this regard. This is true of class action statutes recently enacted in the United States,[52] as well as of class action procedures proposed in the Commonwealth.[53] Undoubtedly, categorization of class actions was eschewed in these jurisdictions for the reasons set out above, which are perhaps best summarized as follows:[54]

> [T]he distinctions rule 23(b) attempts to draw among the situations in which class actions may be appropriate serve little function, and therefore could be abandoned. Once stare decisis impacts are acknowledged, almost any class action can be seen to possess characteristics resembling those set out in rule 23(b)(1). Moreover, a great many class actions brought for monetary relief also seek injunctive or declaratory remedies, and thus rule 23(b)(2) also has the potential for encompassing most class suits. Since the categories which rule 23(b) sets out are thus not intrinsically distinct, whatever reason exists for their retention must be found in their ancillary function of separating out that group of cases, defined by rule 23(b)(3), in which individualized notice and extension to class members of a right to opt out may be most desirable. In fact, however, individualized notice is neither required nor necessarily improper in any identifiable subset of class

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[51] See, for example, Note, "Antidiscrimination Class Actions under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)" (1979), 88 Yale L.J. 868.

[52] See, for example, N.Y. Civ. Prac. Law §§901-909 (McKinney); Illinois Civil Practice Act, Ill. Ann. Stat. ch. 110, §§57.2-57.7 (Smith-Hurd 1981 Supp.); and National Conference of Commissioners on Uniform State Laws, Uniform Class Actions Act, Uniform Laws Ann. (1975), Vol. 12 (Cum. Supp. 1981), at 20 (hereinafter referred to as "U.C.A.A.").

[53] See Bills C-42 and C-13, *supra*, note 30; Williams' Model Act, *supra*, note 34; and South Australia Draft Bill, *supra*, note 35.

[54] Harvard Developments, *supra*, note 33, at 1626.

> actions, and extension of the right to opt out ought to be generally disfavoured. Not even this ancillary jurisdiction, therefore, argues persuasively for the retention of the rule 23(b) distinctions.

For the reasons stated above, the Commission recommends that actions under the proposed *Class Actions Act* should not be divided into categories similar to those established by Rule 23. Rather, all class actions should be treated alike, and should be subject to uniform rules with respect to such matters as commonality, superiority, notice, and the right of class members to exclude themselves from an action. With the exception of the commonality prerequisite, which we deal with in the next section, these are matters that will be considered later in this Report.

(ii) Common Questions

Rule 23(a)(2) provides no guidelines respecting the type of qualitative or quantitative standard that must be met in order to satisfy the court that there are questions of law or fact common to the class. There is an overwhelming body of authority to the effect that it is not necessary for the class representative to show that all the questions to be litigated in the action are common questions.[55] Indeed, it has been suggested that the common questions requirement embodied in Rule 23(a)(2) would be satisfied by the existence of a "single issue common to the class".[56]

Beyond these basic principles, however, there exists no single test that has received universal approval. Some commentators and courts have not thought it necessary to discuss the common questions test in any detail: most class actions would seem, without question, to satisfy this requirement,[57] thereby rendering any discussion of it superfluous. Nevertheless, certain important matters have been dealt with by the courts in the course of considering the common questions test. For example, it has been stated many times that the mere fact that there is a claim for damages, with each member's claim varying in amount, does not result *per se* in a failure to satisfy the common questions test.[58] In such cases, the courts have pointed to the possibility, under Rule 23(c)(4)(A),[59] of dealing with the issue of damages in

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[55] Many of the cases are listed in Wright and Miller, *supra*, note 13 (Curr. Supp. 1981), §1763, at 160-61, *n.* 85; Newberg, *supra*, note 10, §1110a, at 180; Newberg, "Burden of Proof for Class Issues" (1974), 3 C.A.R. 103, at 111; and Practising Law Institute, *Class Actions 1976: The Basics* (1976), at 19.

[56] Newberg, *supra*, note 10, §1110f, at 184.

[57] See Newberg, *ibid.*, §1110a, at 180, and the cases cited in Moore, *Federal Practice* (2d ed., 1980), Vol. 3B, ¶23.06-1, at 23-171 - 23-172.

[58] See, for example, *Chevalier v. Baird Savings Ass'n,* 72 F.R.D. 140 (E.D. Pa. 1976); *In re Home-Stake Production Co. Securities Litigation*, *supra*, note 15; *In re Fine Paper Antitrust Litigation, supra,* note 12; and *Marshall v. Kirkland*, 602 F.2d 1282 (8th Cir. 1979). Compare *Trecker v. Manning Implement, Inc.*, 73 F.R.D. 554 (N.D. Iowa 1976), and *Indiana State Employees Ass'n, Inc. v. Indiana State Highway Commission*, 78 F.R.D. 724 (S.D. Ind. 1978). In each of these latter two cases, however, the Court concluded that the common questions did not predominate over the questions affecting individual members of the class.

[59] This subdivision provides that "[w]hen appropriate (A) an action may be brought or maintained as a class action with respect to particular issues". This provision would seem to authorize the bringing of class actions to determine a single issue.

proceedings subsequent to the determination of the common issue of liability, or they have noted that the damages claimed can be easily calculated by the application of an arithmetical formula.

The content that has been given to the common questions test under Rule 23 is very general in nature. One commentator has described the common questions test as a functional one that seeks to determine whether the class members share a common legal controversy.[60] Another commentator claims that the common questions prerequisite requires a showing that there has been a "common course of conduct", that is to say, the defendant has pursued a consistent course of misconduct resulting in injury to all the members of the class.[61] While there may be a difference of opinion regarding the correct interpretation of the common questions requirement, the policy underlying it would seem to be clear, that is, to ensure that class actions achieve certain economies. Only where common questions are involved will a class action result in any possible savings for the class members and the courts.[62] But how does this policy underlying the common questions test differ from that behind the common questions predominance requirement imposed by Rule 23(b)(3)? It is to this question that we now turn our attention.

(iii) Common Questions Predominance

As was mentioned earlier, Rule 23(b) divides class actions into three categories. It is only the Rule 23(b)(3) kind of class action that must satisfy the common questions predominance requirement; the other two kinds of class action will be certified if it is shown, *inter alia*, that "there are questions of law or fact common to the class",[63] a condition of Rule 23(b)(3) class actions as well.

Unlike the common questions requirement, the common questions predominance condition has been the source of considerable controversy. Critics of class actions have alleged, for example, that some judges are so anxious to see damage class actions proceed that they often alter the substantive law to create common questions for the class.[64] Proponents of

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[60] See Newberg, *supra*, note 10, §1030, at 69. Newberg suggests that a single common question may be sufficient to satisfy this requirement: *ibid.*, §1110a, at 180.

[61] See Moore, *supra*, note 57, ¶23.06-1, at 23-174 to 23-175, *n.* 13. This test was first enunciated in a securities fraud case: see *Kronenberg v. Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D.N.Y. 1966). It has since been adopted in many other such cases: see, for example, *Fisher v. Kletz*, 41 F.R.D. 377 (S.D.N.Y. 1966), and *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968).

[62] See Newberg, *supra*, note 10, §1110f, at 184, where the author comments as follows:

> The emphasis of the rule is on situations that call for unitary adjudication to protect the rights of class members or those of the party opposing the class, to provide a forum when individual litigation would be impractical, and to achieve judicial economy. The key to these objectives is the resolution of common issues in a single proceeding, which will both minimize the expenditure of judicial resources and result in a single resolution of common issues binding on all class members.

[63] See Fed. R. Civ. P. 23(a)(2).

[64] See discussion *supra*, ch. 4, sec. 3(b)(ix).

class actions, on the other hand, argue that the predominance requirement is too stringent and should be modified in order to facilitate the certification of damage class actions.[65] In light of the considerable controversy surrounding the common questions predominance requirement, it is important to examine the case law in some detail to determine whether a similar condition should be included in the proposed Ontario *Class Actions Act*. Moreover, given that the Commission has proposed that all class actions should be treated similarly,[66] the common questions predominance issue takes on an added significance. To repeat, the common questions predominance prerequisite is applicable only to Rule 23(b)(3) class actions, and not to class actions brought pursuant to Rule 23(b)(1) and (2). If the Commission were to recommend the adoption of a common questions predominance test, applicable to all class actions, we would be advocating a class action procedure considerably more restrictive in scope than Rule 23 of the United States Federal Rules of Civil Procedure, and perhaps narrower than even the present Ontario class action Rule.

Few authoritative conclusions can be drawn about the standards employed by courts in the United States in determining whether common questions predominate: the law is unclear and many of the cases are irreconcilable.[67] Five tests have been propounded by courts and class action commentators as possible guides to the common questions predominance issue. These are (1) the common nucleus of operative facts test, (2) the common course of conduct test, (3) the outcome-determinative test, (4) the quantitative analysis test, and (5) the common questions dispositive test. No one test has prevailed as yet.

The test most frequently invoked by the courts is the common nucleus of operative facts test. First used in a case concerning franchise agreements, *Siegel v. Chicken Delight, Inc.*,[68] this test has been employed most often in securities cases involving an allegation of fraud,[69] and in antitrust cases where a price fixing conspiracy has been alleged.[70] The courts applying this test look for a sufficient mutuality of interests among the class members to justify the determination of their rights in a single suit.[71] The mere fact that all the issues

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[65] See discussion *infra*, this ch., sec. 3(c)(iii), of O.I.A.J. Bill H.R. 5103, *supra*, note 18, introduced under the auspices of the United States Department of Justice, Office for Improvements in the Administration of Justice, which would lower the standard to a substantial common question requirement.

[66] See *supra*, this ch., sec. 3(b)(i).

[67] For a discussion of the relevant case law, see Wright and Miller, *supra*, note 13, Vol. 7A, §1778, at 50-57. See, also, Moore, "The Potential Function of the Modern Class Suit" (1973), 2 C.A.R. 47, at 61-62.

[68] 271 F. Supp. 722 (N.D. Cal. 1967), aff'd in part *sub nom. Chicken Delight, Inc. v. Harris*, 412 F.2d 830 (9th Cir. 1969).

[69] See, for example, *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968).

[70] See, for example, *Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969).

[71] For a discussion of the operation of the common nucleus of operative facts test, see Swiatlowski, "The Predominance Requirement: Antitrust Class Actions and the 'Commercially Unique' Product" (1976), 27 Syracuse L. Rev. 1257, at 1267. See, also, Wright and Miller, *supra*, note 13, Vol. 7A, §1778, at 53-54.

raised by the action will not be disposed of in the class action is not fatal; after all, predominance acknowledges the possibility of individual, as opposed to common, questions. Moreover, the courts applying this test are careful to scrutinize the class action to determine whether any factual differences that do exist are in fact relevant to the cause of action alleged.[72]

The second test employed by the courts – the common course of conduct test – has been used primarily in cases where it has been alleged that the defendant has made fraudulent representations respecting stock offered for sale;[73] however, it has not been restricted to this area of the law. One of the earliest cases in which this test was adopted is *Dolgow v. Anderson*,[74] a stock fraud case involving a number of representations made by the defendant over a period of time. In *Dolgow*, the Court concluded as follows:[75]

> Plaintiffs have successfully brought themselves within the 'common course of conduct' line of cases. They have alleged a 'continuous and common plan' to manipulate the price of Monsanto stock. All of the alleged false statements were addressed to the general investing public, not to individual shareholders.

Turning to the third test advocated by some courts – the outcome-determinative test – common questions will be said to predominate if their determination would resolve the mass of disputes. The majority of courts in the United States have not relied on this particular test; indeed, one commentator has suggested that it is "unsatisfactory".[76]

Both the fourth and fifth tests, the quantitative analysis test and common questions dispositive test, respectively, also have found little favour with the courts. The former seeks to compare the time that it is estimated will be required to resolve the individual issues with the time necessary to dispose of the common issues. Unless less time will be needed to dispose of the common issues, the common questions will not be said to predominate. This test was discredited in *Minnesota v. United States Steel Corp.*,[77] and it has generally been rejected by the courts since then.[78]

The fifth test, the common questions dispositive test, is the invention of the American College of Trial Lawyers.[79] Concerned with the possible impact on the workload of the courts of separate trials on such issues as reliance or damages, it has suggested that class actions should be allowed to proceed only

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[72] Swiatlowski, *supra*, note 71, at 1268.

[73] See Wright and Miller, *supra*, note 13, Vol. 7A, §1781, at 92.

[74] *Supra*, note 15.

[75] *Ibid.*, at 489.

[76] See Moore, *supra*, note 57, ¶23.45[2], at 23-329.

[77] 44 F.R.D. 559 (D. Minn. 1968), at 569.

[78] See Wright and Miller, *supra*, note 13, Vol. 7A, §1778, at 52-53; Moore, *supra*, note 57, §23.45[2], at 23-328 - 23-329; and Harvard Developments, *supra*, note 33, at 1506.

[79] See American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure* (1972), at 6-9 and 25-27.

if it is determined at the certification hearing that there are no significant individual issues, so that the common questions would be dispositive of the action. Consequently, only damage class actions in which each member's entitlement could be ascertained by the application of a formula would be countenanced. This strict test, similar in many respects to the "same interest" requirement found in Rule 75 of the Supreme Court of Ontario Rules of Practice, would greatly reduce use of the Rule 23 class action mechanism. Moreover, it would seem to be contrary to the spirit of Rule 23 itself. Subdivision (c)(4)(A) of Rule 23 permits a court to order a class action to be maintained with respect to particular issues. Nowhere in Rule 23 is it stated or suggested that subdivision (c)(4)(A) may be relied upon only where the issues in question would be dispositive of the dispute.

(c) The Commission's Proposed Common Questions Requirement: The Alternatives

That class actions must be subject to some commonality requirement is, in the view of the Commission, beyond any doubt. By definition, a class action is a procedural means of disposing of the similar claims of numerous persons. However, the degree of commonality that should be necessary before an action is allowed to proceed in class form is the troublesome question. The "same interest" requirement found in Rule 75, and the content given to it by judicial interpretation, have significantly reduced the number of class actions that are brought and maintained in Ontario. While some Anglo-Canadian class actions for monetary relief have been allowed to proceed on the basis that the damages claimed can be easily established through the use of common evidence or proof,[80] a great many others in which damages have been sought have been dismissed on the ground that the class members do not have the "same interest" in the litigation.[81] The Ontario Court of Appeal has so concluded,[82] despite its apparent willingness to deal with non-monetary issues in subsequent individual proceedings, as would be the case in *Naken*.[83] The distinction drawn in this jurisdiction between monetary and non-monetary issues is, in our view, highly artificial. There have been indications in recent cases[84] that the mere existence of certain individual issues that will not be resolved by the class action will not be fatal to the class suit, and that the test enunciated by Lord Macnaghten in *Duke of Bedford v. Ellis*,[85] rigidly applied by Anglo-Canadian courts,[86] is perhaps too restrictive. Notwith-

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[80] See, for example, *Farnham v. Fingold*, [1973] 2 O.R. 132, 33 D.L.R. (3d) 156 (C.A.), and *Cobbold v. Time Canada Ltd., supra*, note 6.

[81] See, for example, the seminal decision of *Markt & Co., Ltd. v. Knight Steamship Co., Ltd.*, [1910] 2 K.B. 1021 (C.A.), especially the judgment of Fletcher Moulton L.J.

[82] *Stephenson v. Air Canada, supra*, note 40.

[83] *Supra*, note 8.

[84] See, for example, *Cobbold v. Time Canada Ltd., supra*, note 6, and *Naken v. General Motors of Canada Ltd., supra*, note 8.

[85] *Supra*, note 37.

[86] See *Markt & Co., Ltd. v. Knight Steamship Co., Ltd., supra*, note 81, the early Ontario case of *Shields v. Mayor*, [1953] O.W.N. 5, [1953] 1 D.L.R. 776 (C.A.), and the most recent decision of the Ontario Court of Appeal in *Stephenson v. Air Canada, supra*, note 40.

standing this liberalization of the "same interest" requirement in recent years, the uncertainty and artificiality that still surround the meaning of the "same interest" prerequisite compel the Commission to call for reform of this aspect of class action law.

The question then becomes what test should take the place of the present "same interest" requirement. In the opinion of the Commission, the alternatives to this requirement of Rule 75 are five in number, and it is to these alternatives that we now wish to address ourselves.

(i) Rule 23: Common Questions and Common Questions Predominance

The first alternative is the dual requirement imposed by Rule 23 of the United States Federal Rules of Civil Procedure, described above. The Commission rejects the Rule 23 approach to the commonality issue, which imposes different tests depending on the category of subdivision (b) of Rule 23 into which a particular class action falls. As we have eschewed the categorization of class actions and have decided to treat all class actions alike,[87] we can see no basis for the imposition of different commonality tests.

Should, then, all class actions brought pursuant to the proposed *Class Actions Act* be required to satisfy both a common questions test and a common questions predominance test? On balance, we do not see the necessity for both these requirements. If it must be shown that the common questions in the class action predominate over the individual questions, a simple common questions requirement would seem to be superfluous, a view that has been taken by a number of class action commentators.[88] We consider the alternatives of either a common questions test or a common questions predominance requirement below.

(ii) The Quebec Class Action Legislation

The commonality issue is dealt with in the Quebec class action legislation by the following provision:[89]

> 1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
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> (*a*) the recourses of the members raise identical, similar or related questions of law or fact.

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[87] See *supra*, this ch., sec. 3(b)(i).

[88] See, for example, Wright and Miller, *supra*, note 13, §1763, at 609.

We should point out that this view of the common questions requirement contained in Rule 23 is not universally accepted. See Newberg, *supra*, note 11, §1110b, at 182, citing Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)" (1967), 81 Harv. L. Rev. 356, at 387. See, also, Caton and Dupre, "Rule 23 and Class Action Development" (1973), 12 Washburn L.J. 343, at 356.

[89] C.C.P., *supra*, note 29, art. 1003(*a*).

This article of the Quebec *Code of Civil Procedure* is unique in its approach to the commonality issue: no other legislation or proposed legislation of which we are aware sets up different standards in the manner of article 1003(*a*). These standards, ranging from the strict ("identical" questions of law or fact) to the permissive ("related" questions of law or fact), may give the courts a broad discretion respecting the commonality issue. At the same time, however, it may be argued that the variety of standards that the Quebec courts' apparently may apply under this legislation can only give rise to substantial uncertainty. For this reason, we have decided not to adopt as the commonality test for the proposed *Class Actions Act* a provision similar to article 1003(*a*) of the Quebec *Code of Civil Procedure*.

(iii) O.I.A.J. Bill H.R. 5103

There are two aspects of the commonality prerequisite included in O.I.A.J. Bill H.R. 5103 that merit comment. Not only would the class representative have to satisfy the court that "the action presents a substantial question of law or fact common to the injured . . . persons",[90] but he also would be required to show that "the injuries arise out of the same transaction or occurrence or series of transactions or occurrences".[91] The Bill Commentary makes little reference to the "same transaction" requirement, other than stating that the test is "found elsewhere in the federal rules".[92] Insofar as the "substantial common question" prerequisite is concerned, the Bill Commentary notes that this test is "more objective" than the "[c]urrent vague and ill-defined standards".[93]

Another criticism outlined in the Bill Commentary of the common questions predominance requirement found in Rule 23 concerns the possible result of a literal interpretation of the requirement. The Commentary suggests that such an interpretation would sound the death-knell for all damage class actions: "by their nature, these actions involve many different impact and damage issues, while at the same time displaying some issues capable of combined treatment".[94] The fear of a literal interpretation of the common questions predominance requirement, however, would seem to be totally unfounded. The notion that the need for individual calculation of damages precludes the predominance of the common questions has won little support.[95] The substantial common question requirement of Bill H.R. 5103, on the other hand, may be a standard not sufficiently exacting.

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[90] O.I.A.J. Bill H.R. 5103, *supra*, note 18, §3011(a)(3).

[91] *Ibid.*, §3011(a)(2).

[92] United States Department of Justice, Office for Improvements in the Administration of Justice, *H.R. 5103 - Bill Commentary: The Case for Comprehensive Revision of Federal Class Damage Procedure* (July 25, 1979), at 26 (hereinafter referred to as "Commentary to Bill H.R. 5103"). The Commentary refers to rr. 13 and 20 of the Federal Rules of Civil Procedure, concerned with counterclaims and cross-claims, and joinder, respectively.

[93] *Ibid.*, at 26.

[94] *Ibid.*, at 27-28.

[95] See *supra*, note 58.

(iv) A Common Questions Predominance Requirement Simpliciter

As indicated, the Commission has considered and rejected the adoption of a two-stage common questions and common questions predominance test similar to that contained in Rule 23 of the United States Federal Rules of Civil Procedure. We turn now to consider the possibility of including in the proposed *Class Actions Act* only a common questions predominance test as a prerequisite to the maintenance of a class action.

Recently, both in New York[96] and in Illinois,[97] a common questions predominance test alone has been introduced as a prerequisite to the certification of a class action. The relevant provision of the New York class action rule states as follows:[98]

> 901.a. One or more members of a class may sue . . . on behalf of all if:
>
> . . . .
>
> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members.

The language of the Illinois class action rule is virtually identical.

Such a test, if adopted, would have certain advantages. The confusion surrounding the two-stage test found in Rule 23 would be avoided. Significantly, the common questions predominance test is the more stringent of the two tests concerned with the common questions issue. While there is still some controversy respecting the precise scope of the common questions predominance prerequisite under Rule 23, our courts would have the benefit of the guidance provided by the American case law. A further argument in favour of the New York and Illinois formulation of the common questions predominance test is the fact that the class action rules in these two jurisdictions have abandoned the categorization of class actions, as we too have recommended.[99]

For the reasons outlined in the following section, however, we do not believe that the common questions predominance test is the one that should be adopted in Ontario as a threshold test for the maintenance of a class

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[96] See N.Y. Civ. Prac. Law §901.a.2 (McKinney).

[97] See Illinois Civil Practice Act, Ill. Ann. Stat. ch. 110, §57.2(2) (Smith-Hurd 1981 Supp.). See, also, "Proposed Federal Consumer Class Action Legislation - II" (1975), 4 C.A.R. 342, at 346.

[98] See *supra*, note 96.

[99] See *supra*, this ch., sec. 3(b)(i). Moore has suggested that predominance of common questions over individual questions is not now required of (b)(1) and (2) suits because "predominance . . . is implicit in the character of those actions": see Moore, *supra*, note 57, ¶23.45[2] at 23-327 - 23-328. If this is so, there would seem to be no point in requiring such actions to meet a common questions predominance requirement. On the other hand, it may be argued that imposing such a requirement on (b)(1) and (2) suits poses few dangers, as it would always be met.

action. Rather, in our view, the issue of predominance more appropriately forms a part of the superiority test to be recommended in chapter 9.

(v) A Common Questions Requirement

The last alternative to the "same interest" requirement now found in Rule 75 that we have considered, and the one that we recommend should be adopted in this jurisdiction, is a simple common questions threshold test, with the issue of the predominance of the common questions over the individual questions forming part of the Commission's proposed superiority test. While this approach has not yet received widespread legislative approval,[100] it has found its way into draft legislation in Canada, Australia, and the United States.

For example, in Canada, both Bills C-42[101] and C-13,[102] discussed previously, addressed the common questions issue in the same manner. Section 39.12(2)(*b*) of both Bills provided as follows:

> 39.12(2) On an application made pursuant to subsection (1), the Court shall order that the proceedings to which the application relates be maintained as a class action if it finds that . . .
>
> (*b*) there are questions of law or fact that appear to be common to the causes of action of the members of the class; . . .

Insofar as the matter of predominance is concerned, section 39.12(3)(*a*) of both Bill C-42 and Bill C-13 stated as follows:

> 39.12(3) In determining for the purposes of an application made pursuant to subsection (1) whether a class action is superior to any other available method for the fair and efficient adjudication of issues to be determined between members of the class in question and the person or persons against whom the proceedings in question were commenced, a Court shall consider
>
> (*a*) whether the questions of law or fact that appear to be common to the causes of action of the members of the class predominate over any questions affecting only individual members; . . .

The difference in the language used in section 39.12(2)(*b*) and that employed in section 39.12(3)(*a*) makes it clear that every class action must satisfy the common questions test, but that the court has a discretion to allow a class action to proceed despite the fact that the common questions do not predominate "over any questions affecting only individual members".

In the Draft Bill for a Class Actions Act appended to the 1977 *Thirty-sixth Report Relating to Class Actions* of the Law Reform Committee of South Australia, a similar approach is taken to the commonality question, although

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[100] See U.C.A.A., *supra*, note 52, which has been adopted in North Dakota and Iowa: see N.D. Cent. Code R. Civ. P. 23, and Iowa R. Civ. P. 42.1-.20 (1980).

[101] *Supra*, note 30.

[102] *Ibid.*

the language is somewhat different from that used in Bill C-42 and Bill C-13. Section 2(2) of the South Australia Draft Bill, which is concerned with the threshold test of the existence of common questions, reads as follows:

> 2. One or more members of a class may sue in the Court as representative parties on behalf of all provided –
>
> . . . .
>
> (2) there are questions of law or fact common to the class.

It should be noted that, under section 2(2), a finding that there are common questions is a precondition to the action proceeding as a class action. This provision should be contrasted with section 3 of the Draft Bill. Under this section, while the court must find that the "class action is superior to other available methods for the fair and efficient adjudication of the controversy", it is not essential that the common questions predominate over individual questions. Rather, predominance is one of two matters to which the court must direct its attention "[i]n determining whether a class action is superior". The terminology of the American Uniform Class Actions Act[103] is similar to that just outlined.[104]

The Commission prefers the approach to the commonality issue adopted by Bills C-13 and C-42, the South Australia Draft Bill for a Class Actions Act, and the American Uniform Class Actions Act. Our reasoning is as follows.

In chapter 5 of this Report, we discussed in some detail the way in which the common questions predominance requirement of Rule 23 has served to prevent the successful assertion of many class actions in various substantive law areas. Particularly in the products liability[105] and mass accident[106] contexts, the presence of individual issues has resulted in denial of certification, notwithstanding the arguments of commentators and some courts that such actions are, indeed, appropriate for class treatment.

In our view, the benefits of an expanded class action procedure can be secured even where a particular class action gives rise to individual questions as well as common questions. Where the claims of class members are individually recoverable, judicial economy can be achieved by the disposition in one proceeding of questions common to the class; denial of certification in such cases will mean simply that class members' claims will probably be litigated individually. Where the claims of class members are individually nonrecoverable, denial of class status will effectively prevent the assertion of such claims, thereby frustrating the access potential of class actions. Accordingly, we believe that the commonality threshold test for class actions should not be too onerous; a simple common questions requirement, in our opinion,

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[103] U.C.A.A., *supra*, note 52.

[104] See *ibid.*, §§1(2) and 3(a)(1) and (5), for the common question and the common questions predominance requirements, respectively, of the Uniform Class Actions Act.

[105] See *supra*, ch. 5, sec. 3(d)(i).

[106] *Ibid.*, sec. 3(e)(i).

would be sufficient to ensure that every class action certified will either effect certain economies or provide access to the judicial system by those with small claims.

At the same time, we do envisage an important role for the common questions predominance test found in Rule 23(b)(3) of the United States Federal Rules of Civil Procedure. This test may serve a useful function by requiring the court to focus upon the constituent elements of the alleged cause of action in order to ascertain whether the suit is a proper one for class treatment.[107] We have no doubt that certification of certain class actions that involve many individual issues would be undesirable, and would impose an intolerable burden on the courts. Where individual issues overwhelm the common questions raised by a class action, other available procedural alternatives may be superior to a class action, particularly where such claims are individually recoverable. Consequently, the Commission believes that the predominance test is more relevant to the question whether, in a given case, the bringing of a class action is the "superior" method of proceeding with the claims of the class members. Predominance of common questions over individual issues should be one of the factors that a court should be required to weigh in determining the issue of superiority, and we so recommend.[108]

In our view, resort to a common questions threshold test, rather than to a common questions predominance requirement, would have the benefit of enhancing the flexibility of the class action procedure that we propose should be adopted in Ontario. It is possible to envisage actions that would benefit from class treatment even though the individual issues raised by the litigation predominate over the common questions. In such cases, economies can still be achieved by proceeding in class form, or access may be provided to those with claims that otherwise could not be asserted because they are individually nonrecoverable. Mass accident actions are a good example of cases that, despite a lack of predominance, perhaps still should be certified as class actions. After all, the lack of predominance will not always offset the savings in time and money to be secured by determining the common questions in a single proceeding. Nor does the fact that the common questions do not predominate over the individual questions necessarily diminish the *res judicata* effect of the class action with respect to the common questions. Consequently, inconsistent verdicts on the common questions still will be avoided.

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[107] See Harvard Developments, *supra*, note 33, at 1506:

> If the content of predomination doctrine as it has developed under rule 23 thus does not explicitly reveal the kind of approach which a substantive theory of class actions would suggest, practice under rule 23 nonetheless conforms rather closely to the substantive model. Before a court can judge whether common questions are more 'significant' than individual questions, it must first determine which elements of a cause may in fact be litigated in common and which elements will require separate showings by each class member. This preliminary inquiry is unabashedly substantive: a court must come to a conclusion concerning what modes of proof are permissible under a given cause of action.

[108] See Draft Bill, s. 4(*a*).

Accordingly, we recommend that the court should certify an action as a class action only if it finds that it raises questions of fact or law common to the members of the class.[109] It should be emphasized that this common questions requirement would replace the "same interest" test to be found in the present class action Rule. Although the courts in recent cases have shown some willingness to liberalize the present "same interest" test, we believe that a break with the past is necessary to ensure that the courts approach this issue unfettered by the restrictions that have been imposed under Rule 75.

Undoubtedly, the change from a same interest test to a common questions test may result in a great many more class actions being allowed to go forward. Under the proposed common questions test, the mere fact that a class action may require individual assessment of damages should not bar the action from proceeding as a class action – a position towards which the Ontario courts have been moving in recent years in any event.[110] Similarly, the mere existence of separate contracts between the members of a class and the defendant should not prevent certification of an action under the common questions test that we have recommended. Again, this would seem to be in conformity with the judicial trend under the present Ontario class action Rule.[111] However, to put these matters beyond doubt, we shall recommend in chapter 14 that the proposed *Class Actions Act* should provide expressly that the court should not refuse to certify an action as a class action on the ground only that the relief claimed includes a claim for damages that would require individual assessment in subsequent proceedings involving the defendant or that the relief claimed arises out of or relates to separate contracts between members of the class and the defendant.[112]

4. ADEQUACY OF REPRESENTATION

(a) Introduction

A distinguishing characteristic of a class action is that it determines the interests of individuals in their absence. In this respect, the class action is clearly an exception to one of the basic tenets of our system of justice, that is, that no person should have his rights determined without being afforded an opportunity to be heard. Since we later recommend that absent class members should be bound by the decision of the court hearing a class action,[113] it becomes imperative that the proposed *Class Actions Act* contain provisions to ensure that the rights and interests of the absent class members will be protected in all class actions permitted to be maintained in Ontario.

Surprisingly, the present Ontario class action provision is silent on the question of the quality of the representation afforded absent class members.

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[109] See Draft Bill, s. 3(3)(*c*).

[110] See discussion *supra*, ch. 2, sec. 2(c)(ii)b.

[111] *Ibid.*, sec. 2(c)(ii)a.

[112] See *infra*, ch. 14, sec. 2(c).

[113] See *infra*, ch. 18.

Rule 75, as we have pointed out,[114] allows a self-appointed representative to bring a class action "[w]here there are numerous persons having the same interest". Under the present Rule, a person need not obtain the approval of the court to act as the representative of a plaintiff class.[115] In sharp contrast, under Rule 75, the court must approve the person selected to act as the representative of a defendant class.[116] The "same interest" requirement of Rule 75 has been used on occasion to ensure that there is no conflict between the interests of the class plaintiff and those of the other class members; the cases in which the courts have addressed themselves specifically to this question, however, have been few and far between.[117] Without a doubt, the absence of any obligation on the class representative to satisfy the court that he will adequately protect the interests of the absent class members is one of the most glaring deficiencies of the present Ontario class action Rule. Any new class action legislation should remedy this infirmity of Rule 75, and in this section we shall make a number of recommendations to this end. We begin with an examination of the question whether the class representative should have to be a member of the class he purports to represent.

(b) Membership in the Class by the Representative Plaintiff

In chapter 6, we recommended the adoption in Ontario of a class action procedure that incorporates private initiation of class proceedings by a member of the class. At that time, we did not address specifically the desirability of restricting the initiation of an action in class form to a representative plaintiff who is a member of the class. This issue has been the subject of some controversy in the United States and, in our view, deserves brief consideration in the context of the issue of adequacy of representation.

Implicit in the language of Rule 75 is a requirement that the class representative be a member of the class; one or more of the "numerous persons having the same interest" "may sue . . . on behalf of, or for the benefit of, all". The case law would seem to confirm this particular view of Rule 75.[118]

Again, while there is no express provision in Rule 23 of the United States Federal Rules of Civil Procedure that requires the class representative to be a member of the class on behalf of which the suit is brought, such a prerequisite seems implicit in the opening flush of the Rule: "[o]ne or more members of a

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[114] See *supra*, ch. 2, sec. 2(c)(iii)a.

[115] See *Markt & Co., Ltd. v. Knight Steamship Co., Ltd.*, *supra*, note 81, at 1039, and *Sykes v. One Big Union* (1936), 43 Man. R. 542, [1936] 1 D.L.R. 662 (C.A.).

[116] See, for example, *Barrett v. Harris* (1921), 51 O.L.R. 484 (H.C. Div.).

[117] See *DeLong v. New Brunswick Teachers' Federation* (1970), 3 N.B.R. (2d) 149 (S.C., Q.B.), and *Fraser v. Cooper, Hall, & Co.* (1882), 21 Ch. D. 718.

[118] See, for example, *Harris Maxwell Larder Lake Mining Co. v. Gold Fields Ltd.* (1911), 23 O.L.R. 625 (H.C. Div.); *Lund v. Walker* (1928), 34 O.W.N. 262 (H.C. Div.); *Sykes v. One Big Union, supra*, note 115; and *Sykes v. McCallum* (1940), 48 Man. R. 85, [1940] 4 D.L.R. 413 (K.B.).

class may sue . . . as representative parties on behalf of all".[119] Indeed, there is a *dictum* from the United States Supreme Court to the effect that representative plaintiffs "cannot represent a class of whom they are not a part".[120] Put somewhat differently, the class representative must have standing to sue in his own right before he can claim to sue on behalf of a class.

The major argument in favour of a requirement that the class representative be a member of the class is that self-interest will help to ensure adequate representation for the class members. On the other hand, it may be contended that a personal stake in the litigation does not necessarily ensure adequate representation. Since many class actions will involve claims that are small in amount, the self-interest argument cannot be taken too far.[121] Conversely, if the class representative's claim is a large one, his self-interest may ensure that his interests are advanced, perhaps to the detriment of the other class members.

While there may be some truth in the view that, if the class representative has a personal stake in the action, the other class members are likely to benefit therefrom, it may be argued that the absence of a personal stake, or the lack of individual standing, does not mean necessarily that the interests of the class will not be protected, or even that the interests of the class will be protected to any lesser degree.[122] For example, a particular individual, because of some special ability or experience, may be not only an adequate class representative but the most adequate class representative. This may be the case even though he himself has not suffered any injury, has no individual standing to sue the defendant and, *a fortiori*, is not a member of the class. In some instances, an ideological advocate, that is, a person or group identical in interest to the persons who have suffered injury, such as a consumers' association, may be an ardent and capable representative, thereby ensuring that the interests of class members will be pressed and protected.

From the above discussion, it would appear that the arguments respecting the need for the class representative to be a member of the class are

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[119] Steininger, "Class Actions: Defining the Typical and Representative Plaintiff under Subsections (a)(3) and (4) of Federal Rule 23" (1973), 53 B.U. L. Rev. 406, at 414. See, also, Newberg, *supra*, note 10, §1040, at 84; Kane, "Standing, Mootness, and Federal Rule 23 – Balancing Perspectives" (1976-77), 26 Buffalo L. Rev. 83, at 111; and Bledsoe, "Mootness and Standing in Class Actions" (1973), 1 Fla. St. U. L. Rev. 430.

[120] See *Bailey v. Patterson*, 369 U.S. 31 (1962), at 32-33. See, also, Wright and Miller, *supra*, note 13, §1761, at 584, and Moore, *supra*, note 57, ¶23.04-[2], at 23-120, for a brief discussion of the U.S. decisions in which the courts have stated outright that the named representative must be a member of the class. For a recent pronouncement from the United States Supreme Court in respect of this issue, see *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977). See, also, *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460 (N.D. Cal. 1978); *Karan v. Nabisco, Inc.*, 78 F.R.D. 388 (W.D. Pa. 1978); *Drayton v. City of St. Petersburg*, 477 F. Supp. 846 (M.D. Fla. 1979); *Mawson v. Wideman*, 84 F.R.D. 116 (M.D. Pa. 1979); and *Duncan v. State of Tennessee*, 84 F.R.D. 21 (M.D. Tenn. 1979). Compare the decision of the United States Supreme Court in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980).

[121] See Note, "Class Standing and the Class Representative" (1981), 94 Harv. L. Rev. 1637, at 1653-56.

[122] *Ibid.*

equally balanced. While there is some case law in the United States that would support a relaxation of the standing requirement in the class action context,[123] the weight of authority would seem to favour the orthodox view that a class representative should have individual standing to sue on behalf of a class.[124]

We have considered carefully this particular issue and have concluded that, except where the Attorney General assumes the role of representative plaintiff,[125] the proposed *Class Actions Act* should require that the class representative be a member of the class on whose behalf the action is brought.[126] As the Commission is now engaged in a project on the law of standing, we believe that it would be premature at this time to recommend even a minor change in the law. All the arguments for and against the traditional common law standing rules have yet to be weighed by the Commission. It may well be that, after we have completed our study of the law of standing, it will be necessary to revisit this particular issue.

(c) The Adequacy Requirement

Having determined that the class representative must be a member of the class for whose benefit he has brought the action, we turn to the question of

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[123] See, for example, *Haas v. Pittsburgh National Bank*, 526 F.2d 1083 (3d Cir. 1975), at 1088-89. For a discussion of this case, see Conn, "Federal Courts and Procedure – Class Actions – Standing – Nominal Plaintiff Without Individual Standing May Represent Certified Class Where Adequate Representation Is Shown" (1976), 45 U. Cin. L. Rev. 317. Conn, at 323, has noted that the true significance of the *Haas* decision lies with its potential for expansion:

> The next step may be '*issue standing*': where in fact a true issue exists, the issue should be litigated provided that the advocate can represent the best interests of his position. . . . Whether the issue is the environment or credit card financing, the issue presented should be resolved regardless of the standing of the parties, if the opposing positions are represented adequately [emphasis added, footnotes omitted].

Other commentators also have commented favourably on an issue standing approach: see Kane, *supra*, note 119, at 97-99; Shafner, "The Juridical Links Exception to the Typicality Requirement in Multiple Defendant Class Actions: The Relationship Between Standing and Typicality" (1978), 58 B.U. L. Rev. 492, at 496-98; and Harvard Developments, *supra*, note 33, at 1467-68.

[124] See *supra*, note 120. The present position is summarized well by Kane, *supra*, note 119, at 97-98 (footnotes omitted):

> Despite the seeming logic of this conclusion, the use of class standing as the sole basis for instituting an action has been rejected by the courts. To avoid dismissal based on lack of standing, the named representative must show that he has suffered or is in immediate danger of sustaining some personal injury. While the imposition of this requirement on the class representative appears unnecessary in view of a viable class claim for relief, it is consistent with the Supreme Court's continued rejection of the ideological plaintiff in general public interest suits. Moreover, although the Court's rejection of class standing can be deplored, it appears to be so firmly entrenched that arguments to the contrary would be futile at this time.

[125] See discussion, *supra*, ch. 6, sec. 1(b)(v).

[126] See Draft Bill, s. 2(1) and (2).

what qualities the class representative, and his lawyer, should display in order to satisfy the adequacy of representation requirement. As we have indicated, the importance of the adequacy of representation requirement cannot be overemphasized, for it is this prerequisite to the bringing of a class action that legitimizes the disposition of the interests of individuals who are not before the court. The significance of the adequacy of representation issue should be apparent from the central role that this particular precondition has been given in most modern class action legislation. Certainly, in the United States, the protection to be afforded absent class members has had the attention of courts and commentators since Rule 23 of the United States Federal Rules of Civil Procedure was substantially amended in 1966.

To some extent, the concern in the United States with adequacy of representation and the notice issue[127] can be attributed to that country's constitutional due process guarantee. The Fifth Amendment to the Constitution of the United States provides, *inter alia*, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . .". The Fourteenth Amendment contains a similar prohibition applicable to the states. In the context of class actions, although there is some authority to the effect that due process may be satisfied by notice alone,[128] this view has been doubted.[129] Certainly, many commentators have considered adequacy of representation to be essential to the constitutional due process requirement.[130] Just as notice to absent class members, by itself, may not satisfy the due process provisions of the Constitution of the United States, so too evidence of the adequacy of the representative plaintiff may not obviate the need for notice. Undoubtedly, at least insofar as Rule 23 is concerned,[131] the uncertainty surrounding the issue of class actions and due process has been complicated by the provisions of the Rule that specifically address the questions of notice and adequacy of representation.[132]

That the constitutional prohibition against depriving any person of "life, liberty or property, without due process of law" is not the sole source of an adequacy of representation requirement, however, is evident from the fact that such a requirement may be found in the class action legislation of jurisdictions with no similar constitutional guarantee.[133] Consequently, the lack of any constitutional due process guarantee in Canada or in Ontario

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[127] For a discussion of the importance of notice of an action to the absent class members, see *infra*, ch. 13.

[128] See, for example, *In re Four Seasons Securities Laws Litigation*, 502 F.2d 834 (10th Cir. 1974), at 843, *cert.* denied 419 U.S. 1033, where the Court stated that "due process may be satisfied by notice alone and that where due process is thus satisfied, adequacy of representation need not be shown as a matter of constitutional necessity".

[129] See Note, "The Importance of Being Adequate: Due Process Requirements in Class Actions under Federal Rule 23" (1975), 123 U. Pa. L. Rev. 1217.

[130] See Wright and Miller, *supra*, note 13, §1765, at 617, and Harvard Developments, *supra*, note 33, at 1471.

[131] Fed. R. Civ. P. 23(a)(4) and (c)(2).

[132] See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), at 176-77.

[133] See discussion *infra*, this sec.

similar to that in the United States cannot be used as an excuse to avoid dealing with this issue.[134] Moreover, while perhaps not constrained by such a constitutional guarantee, the Commission, in devising a new class action procedure, must be cognizant of the principle of fairness that is well recognized in the procedural law of Ontario and Canada.[135] As a result, we have concluded that the attributes or qualities necessary in a class representative, and his lawyer, should be addressed expressly by the Commission in its proposed *Class Actions Act* in order to guarantee "vigorous prosecution" of the claims of class members.

Before turning to this subject, however, we should say a few words about the notice requirement that will be imposed by the Commission's proposed class action legislation. In a subsequent chapter of this Report,[136] we deal at some length with the notice issue and, specifically, whether the absent class members should be entitled to notice of a class action after certification. We there recommend that the court ordering certification should be empowered, but not required, to order that notice be given to the members of the class advising them of the pendency of the class action. Given the practical and financial problems that have resulted from the mandatory notice provision applicable to Rule 23(b)(3) suits,[137] it is significant that we have given the court a discretion to order notice. It is for this reason that our proposals concerning adequacy of representation assume special importance. We begin with a brief synopsis of the case law in respect of the adequacy of representation requirement in Rule 23(a)(4) of the United States Federal Rules of Civil Procedure.

(i) Adequacy of Representation under Rule 23

Rule 23(a)(4) requires, as a prerequisite to certification, that "the representative parties will fairly and adequately protect the interests of the class". Underlying the concept of adequacy of representation is the notion that, in order to safeguard the interests of absent class members and to satisfy any constitutional due process requirement, "vigorous prosecution" of the class suit must be guaranteed.[138] The representative plaintiff who will

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[134] See, however, s. 7 of the *Constitution Act, 1981*, Part 1, appearing as Schedule B to the *Canada Act*, Proposed Constitutional Resolution, December 8, 1981, which states as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

It should be noted that this section makes no reference to property rights, as do both the Fifth and Fourteenth Amendments of the Constitution of the United States.

As to the constitutionality of the Resolution, see *Reference Re Amendment of the Constitution of Canada* (1981), 39 N.R. 1 (S.C.C.).

[135] The Supreme Court of Canada recently has enunciated a doctrine of fairness, the precise lineaments of which are not yet clear: see the seminal case of *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671.

[136] See *infra*, ch. 13.

[137] See *Eisen v. Carlisle & Jacquelin, supra*, note 132.

[138] For a discussion of the vigorous prosecution "test", see Newberg, *supra*, note 10, §1120a, at 195-96.

vigorously prosecute the action, more likely than not, will fairly and adequately protect the interests of the class.

Although the case law in respect of Rule 23(a)(4) is abundant,[139] the principles to be applied thereunder are relatively straightforward.[140] For example, it is generally agreed that, before a court can conclude that the named plaintiff will fairly and adequately represent the class, it must be satisfied that his interests are not antagonistic to those of the class that he seeks to represent. In addition, because of the binding effect of a class action judgment, a court must be convinced that the suit is not the result of collusion between the plaintiff and the defendant. A third ingredient of the adequacy of representation requirement of Rule 23 upon which the courts would seem to be in agreement is a showing that counsel for the class is competent to conduct the litigation on behalf of the class. It even has been suggested by some that the adequacy of the representative plaintiff's counsel is of greater import than the adequacy of the representative plaintiff, since "in fact it is class counsel who protects the interests of the class".[141] On the other hand, there are many cases in which the presence of competent counsel has not been sufficient to satisfy the requirements of Rule 23(a)(4); in these cases, the courts have emphasized the importance of a representative plaintiff capable of playing an active role in the litigation,[142] although the level of understanding required of the representative plaintiff may vary from case to case.[143]

We turn then to a discussion of the adequacy of representation requirement that the Commission believes should be included in the proposed *Class Actions Act* as a prerequisite to certification. The discussion that follows is divided into two parts. The first part is concerned with the application of the adequacy of representation requirement to the representative plaintiff. In the second part, we examine the extent to which the judge presiding at the certification hearing should have regard to the adequacy of the representative plaintiff's counsel.

(ii) The Representative Plaintiff

Our discussion of the necessary attributes of a class representative

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[139] See, generally, Newberg, *supra*, note 10, §1120, at 195 *et seq.*; Wright and Miller, *supra*, note 13, §§1765-69, at 615 *et seq.*; and Moore, *supra*, note 57, ¶23.07, at 23-199 *et seq.*

[140] For some recent cases concerning the issue of adequacy of representation, see *Inda v. United Air Lines, Inc.*, 83 F.R.D. 1 (N.D. Cal. 1979); *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979); *Scott v. University of Delaware*, 601 F.2d 76 (3d Cir. 1979); *Jaurigui v. Arizona Board of Regents*, 82 F.R.D. 64 (D. Ariz. 1979); *Vuyanich v. Republic National Bank of Dallas*, 82 F.R.D. 420 (N.D. Tex. 1979); *Apanewicz v. General Motors Corp.*, 80 F.R.D. 672 (E.D. Pa. 1978); *Wofford v. Safeway Stores, Inc.*, *supra*, note 120; and *Greene v. Brown*, 451 F. Supp. 1266 (E.D. Va. 1978).

[141] Note, "Developments in the Law – Conflicts of Interest in the Legal Profession" (1981), 94 Harv. L. Rev. 1244, at 1447.

[142] See, for example, the recent cases of *Jaurigui v. Arizona Board of Regents, supra*, note 140; *Apanewicz v. General Motors Corp., supra*, note 140; *Wofford v. Safeway Stores, Inc., supra*, note 120; and *Greene v. Brown, supra*, note 140.

[143] See, for example, *Chevaliar v. Baird Savings Ass'n, supra*, note 58, at 146-47. See, also, *Fischer v. I.T.T.*, 72 F.R.D. 170 (E.D.N.Y. 1976), and *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litigation*, 78 F.R.D. 622 (W.D. Wash. 1978).

focuses on two qualities, namely, the lack of any interest adverse to that of class members, and his financial means to conduct the action. We begin by examining the absence of any conflict of interest with the class members on the part of the class representative.

a. The Absence of any Adverse Interest

As we have seen, it has been held that a class representative can satisfy Rule 23(a)(4) of the United States Federal Rules of Civil Procedure – that "the representative parties will fairly and adequately protect the interest of the class" – only if he has no interest antagonistic to, or conflicting with, those of the class he purports to represent. The interests of the class representative and of the class, however, need not be identical.[144]

Whether the interests of the class representative conflict with those of the class so as to prevent him from adequately representing the class will depend upon the circumstances of the case. In one case, *Jacobi v. Bache & Co. Inc.*,[145] the plaintiffs charged that the defendant brokerage houses had conspired in violation of antitrust laws to deny commissions to employees on certain sales. The defendants alleged that class representatives who benefited from employee pension and profit sharing plans were not adequate representatives of those who did not. The Court considered such differences insufficient to affect the adequacy of the class representative. On the other hand, in *Wood v. Rex-Noreco, Inc.*,[146] the plaintiffs attempted to maintain a class action on behalf of themselves and other shareholders who allegedly had been defrauded by the corporation. However, the plaintiffs also held 6,000 shares purchased prior to the making of the alleged misrepresentations. The Court concluded that the plaintiffs had a substantial interest in the ongoing welfare of the corporation and, therefore, had concerns sufficiently antagonistic to those of the other class members to render their representation inadequate.

However, it has been held that, even where class members are ordinarily in an adversarial or competitive position, one of them can sue on behalf of all if the conflict does not carry over to the lawsuit. In one case, *Sunrise Toyota, Ltd. v. Toyota Motor Co., Ltd.*,[147] automobile dealers charged that the defendants had conspired to ship to dealers in the New York region a disproportionately small number of Toyota vehicles, thereby discriminating unfairly against the plaintiff class of dealers. The Court rejected the assertion of the defendant that conflicts inevitably arising from the competitive

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[144] See Newberg, *supra*, note 10, §1120b, at 196-97, for a discussion of this issue. Wright and Miller, *supra*, note 13, §1768, at 638-39, have stated the test in somewhat different terms:

> It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent. But only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status [footnotes omitted].

[145] 16 F.R. Serv. 2d 71 (S.D.N.Y. 1972). See, also, the cases cited in Moore, *supra*, note 57, ¶¶23.07[2] and 23.07[3], at 23-219 - 23-242.

[146] 61 F.R.D. 669 (S.D.N.Y. 1973).

[147] 55 F.R.D. 519 (S.D.N.Y. 1972).

relationship among the dealer class members would preclude adequate representation.[148]

The class action legislation or proposed legislation in most jurisdictions that we have examined contains adequacy of representation language quite similar to Rule 23(a)(4). For example, the two successive Bills that were introduced in recent years to amend the *Combines Investigation Act* spoke of an obligation "fairly and adequately [to] represent the interests of the class".[149] The recently enacted Quebec class action legislation provides that the court may authorize the bringing of a class action if it is of the view, *inter alia*, that "the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately";[150] no explicit reference to the conflict of interest question is made either in Bill C-42 or C-13 or in the class action provisions of the Quebec *Code of Civil Procedure*.[151]

Draft legislation in the United States, on the other hand, would direct the courts' attention expressly to the lack of an adverse interest on the part of the class representative as one aspect of the adequacy of representation requirement. The American Uniform Class Actions Act,[152] for example, requires that three conditions must be met in order for a class action to be certified, one of which is that "the representative parties fairly and adequately will protect the interests of the class". Section 3(b) of the Act goes on to provide as follows:

> 3.(b) In determining under Section 2(b) that the representative parties fairly and adequately will protect the interests of the class, the court must find that:
>
> . . . .
>
> (2) the representative parties do not have a conflict of interest in the maintenance of the class action; . . .

In this respect, the Uniform Class Actions Act resembles the legislative proposals contained in the first of the two Bills put forward by the Office for Improvements in the Administration of Justice of the United States Department of Justice for the reform of damage class action procedures. Section 3022(a) of Bill S. 3475[153] provided as follows:

> 3022.(a) In considering . . . the adequacy of the representative party . . . to represent absent persons included within the class in a class compensatory action

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[148] One commentator has stated that to speak of the adequacy of representation test in terms of "lack of conflict" is to impose too onerous a burden on the representative. Newberg suggests, instead, that the court must be satisfied that the interests of the representative plaintiff are "compatible" with those of the class members whom he seeks to represent. See Newberg, *supra*, note 10, §1120b, at 196-97.

[149] See Bills C-42 and C-13, *supra*, note 30, s. 39.12(2)(*c*).

[150] See C.C.P., *supra*, note 29, art. 1003(d).

[151] *Supra*, note 29.

[152] *Supra*, note 52.

[153] See O.I.A.J. Bill S. 3475, *supra*, note 17. This specific provision was deleted from O.I.A.J. Bill H.R. 5103, *supra*, note 18, the successor to O.I.A.J. Bill S. 3475.

the court, without oral or written argument or motion by the parties, shall require counsel to file affidavits stating . . .

(2) the extent to which a party in a class compensatory action has interests common to those of the class or fundamental interests antagonistic to those of the class; . . .

As we have stated, Rule 75 does not require a class representative to establish his adequacy as a representative of the class for whose benefit the action has been brought,[154] let alone deal with the absence of any adverse interest on the part of the class representative, although this prerequisite has been the subject of judicial comment.[155] On the other hand, there would seem to be some precedent in the Proposed Rules of Civil Procedure[156] recommended by the Civil Procedure Revision Committee for making the absence of any adverse interest a prerequisite to a finding that a class representative is adequate. In a somewhat analogous provision, concerned with the adequacy of a litigation guardian for a person under a disability, Rule 7.03 provides in part as follows:

7.03(1) Unless otherwise ordered, the Official Guardian shall act as the litigation guardian of a defendant or respondent where the proceeding is against a minor, in respect of his interest in an estate or trust.

(2) Except as provided in paragraph (1), no person shall act as a litigation guardian for a defendant or respondent who is under disability until he has been appointed by the court.

. . . .

(7) On a motion for the appointment of a litigation guardian, there shall be affidavit or other evidence as to,

. . . .

(h) except where it is sought to have the Official Guardian or the Public Trustee appointed, the fact that the proposed litigation guardian,

(i) consents to act in that capacity;

(ii) is a proper person to be appointed; and

(iii) has no interest in the proceedings adverse to the person under disability.

Rule 7.03(7)(h)(iii) is a codification of the common law rule regarding the suitability of a next friend or guardian *ad litem*.[157]

Despite this precedent, we do not believe that the Commission's adequacy of representation requirement should make specific reference to the lack of any conflict of interest between the representative plaintiff and the class on whose behalf the suit is brought. In our view, "conflict of interest" language

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[154] See discussion *supra*, this ch., sec. 4(a).

[155] See the authorities referred to *supra*, note 117.

[156] Province of Ontario, Ministry of the Attorney General, Civil Procedure Revision Committee, untitled report (June 1980) (hereinafter referred to as "Williston Committee Rules").

[157] See, for example, *Woolf v. Pemberton* (1877), 6 Ch. D. 19, 25 W.R. 873 (C.A.).

may be too restrictive; in some cases, as in the *Sunrise Toyota* case discussed above, the existence of a conflict may not preclude the representative plaintiff from vigorously prosecuting the action or, in other words, acting as an adequate representative for the class.

b. The Financial Resources of the Representative Plaintiff

A comparatively recent issue in class action litigation in the United States concerns the extent to which a class representative's financial capability to conduct the litigation should be a factor in determining whether representation will be adequate within the meaning of Rule 23(a)(4). The following comment describes how this issue has arisen under the adequacy of representation provision of Rule 23:[158]

> Federal courts have indicated that unless there is assurance that the action will be prosecuted forthrightly and vigorously, the rights of absent class members will be considered inadequately protected. An important factor to consider, therefore, is the ability of the representative party to pay the costs of the action, as this bears directly on how strenuously the action will be prosecuted. Although the lower federal courts have begun to consider financial capability in connection with adequate representation, they have not provided a clear standard as to the extent of financial resources necessary to meet the responsibility of adequate protection.

The argument that the class representative's financial resources should be a relevant factor in determining adequacy of representation is one that usually is advanced by the defendant in the action. While the issue is raised purportedly to ensure that the interests of the absent class members are safeguarded, it is more likely that it is being used by the defendant as a weapon in the certification battle.[159]

It would appear that courts in the United States are divided at present on the question whether the adequacy of representation requirement in Rule 23 necessitates an examination of the class representative's financial means.[160] For a number of reasons, we prefer the position adopted in *Sanderson v. Winner*,[161] a case in which the Court concluded that the defendant in a class action should not be permitted discovery of documents pertaining to the class representative's capacity to bear the expenses of litigating the class suit, on the ground that the documents in question were irrelevant to the adequacy of representation issue.

First, it is the view of this Commission that there is no necessary nexus

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[158] Kaye and Sinex, "The Financial Aspect of Adequate Representation under Rule 23(a)(4): A Prerequisite to Class Certifications?" (1977), 31 U. Miami L. Rev. 651, at 653.

[159] *Ibid.*, at 655. See, also, Bullock, "Discovery of Plaintiffs' Financial Situation in Federal Class Actions: Heading 'em Off at the Passbook" (1978), 30 Hastings L.J. 449.

[160] The cases are collected in Kaye and Sinex, *supra*, note 158, and in Newberg, *supra*, note 10, §1120e, at 200, as well as in Bullock, *supra*, note 159.

[161] 507 F.2d 477 (10th Cir. 1974).

between the means of the class representative and his ability to provide the absent class members with adequate representation. As a result, we believe that any reference to the class representative's financial wherewithal would be inappropriate.

Secondly, given the recommendations that the Commission will make with respect to costs in class actions, the resources of the class representative would ordinarily be an irrelevant consideration. Under our recommendations, the costs of class actions likely will be borne, not by the class representative, but by his lawyer.[162]

Thirdly, the Commission is of the view that making an issue of the class representative's financial ability to prosecute the action he has commenced would have a negative impact on class actions. It would discourage those with adequate means from launching class suits, since, by doing so, they would open themselves to the risk of financial disclosure. More importantly, perhaps, it might well prevent class actions where they are most appropriate – in cases in which "the disparity between the costs of litigation and the resources of the individual will be most pronounced".[163]

The Commission is aware of the fact that at least one recent proposal for reform of class actions has made the financial capability of the class representative to prosecute the class suit a precondition to certification. Section 3(b) of the American Uniform Class Actions Act,[164] in addition to making express reference to the conflict of interest point,[165] requires the court to be satisfied that "the representative parties have or can acquire adequate financial resources . . . to assure that the interests of the class will not be harmed".[166] It is only where this can be shown that a court will be able to conclude "that the representative parties fairly and adequately will protect the interests of the class".[167] For the reasons we have stated, we do not agree with the approach to this question adopted by the Uniform Class Actions Act. We recommend that the class representative's financial resources should not be a relevant consideration in determining whether he will be an adequate representative for the class on whose behalf the action has been brought.

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[162] For a discussion of costs in the context of class actions, see *infra*, ch. 17.

[163] *Sommers v. Abraham Lincoln Federal Savings and Loan Association*, 66 F.R.D. 581 (E.D. Pa. 1975), aff'g *sub nom. Sayre v. Abraham Lincoln Federal Savings and Loan Association*, 65 F.R.D. 379, at 385 (E.D. Pa. 1974).

[164] U.C.A.A., *supra*, note 52.

[165] *Ibid.*, §3(b)(2).

[166] *Ibid.*, §3(b)(3). It should be noted that §17(b) of the American Uniform Class Actions Act empowers the court to "authorize and control the solicitation and expenditure of voluntary contributions . . . from members of the class" where it has determined "that the costs and litigation expenses of the [class] action cannot reasonably and fairly be defrayed by the representative parties or by other available sources". It is in this light that §3(b)(3) should be examined.

[167] *Ibid.*, §3(b).

(iii) Adequacy of Representation and the Class Lawyer

As in the case of an action brought by an individual,[168] the main actor in the prosecution of a class action is usually the lawyer and not the claimant. Given this understandable state of affairs, the question has arisen in many jurisdictions whether the court, in deciding the certification issue and, in particular, the matter of adequacy of representation, should examine the capabilities of the class lawyer to conduct the class litigation.[169] It has even been suggested that, although not expressly required by subdivision (a)(4) of Rule 23, "the single most important factor considered by the courts in determining the quality of the representatives' ability and willingness to advocate the cause of the class has been the caliber of the plaintiff's attorney".[170] Despite this emphasis on the abilities of the class lawyer, courts, for the most part, have been reluctant to examine critically the qualifications of the class lawyer in considering the adequacy of representation issue. The reason for this reluctance is not difficult to understand, for an adjudication of the qualifications and abilities of counsel before he has acted is indeed a sensitive issue.[171] Nonetheless, because of the unique character of class actions, we believe that some judicial scrutiny of the adequacy of the class representative's lawyer is warranted.[172]

In the case of class actions involving individually recoverable claims, such scrutiny will help to ensure that the rights of the absent class members

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[168] In *Re Watson v. Bray*, [1933] O.W.N. 419 (H.C.J.), at 420-21, Middleton J.A. stated as follows:

> There are many cases going to show that in litigation the solicitor and not the client controls the procedure of an action. He is employed by the client to conduct the litigation for him and to exercise his knowledge and skill on the client's behalf. He is not a mere servant or agent to be governed and controlled by the dictates of the client, but he is a professional man entrusted with the conduct of the litigation; his duty is to conduct it in accordance with his best judgment.

See, also, the earlier cases of *Shaw v. Nickerson* (1850), 7 U.C.Q.B. 541, and *Wilson v. Corporation of United Counties of Huron and Bruce* (1862), 11 U.C.C.P. 548 (C.A.), for the proposition that the lawyer has complete authority to determine matters pertaining to the management and mode of conducting a trial and all that is incidental to it.

[169] For a discussion of this question, see Symposium on Class Actions, "The Class Representative: The Problem of the Absent Plaintiffs" (1974), 68 Nw. U. L. Rev. 1133; Symposium on Class Actions, "The Vigorous Prosecution Requirement: Initial Determination and Retrospective Evaluation" (1974), 68 Nw. U. L. Rev. 1156; Note, "The Importance of Being Adequate: Due Process Requirements in Class Actions under Federal Rule 23" (1975), 123 U. Pa. L. Rev. 1217; and Kane, *supra*, note 119, at 109-14.

[170] See Symposium on Class Actions, "The Class Representative: The Problem of the Absent Plaintiffs" (1974), 68 Nw. U. L. Rev. 1133, at 1136.

[171] *Ibid.*, at 1137. Compare *Shields v. Valley National Bank of Arizona*, 56 F.R.D. 448 (D. Ariz. 1971). Judge Schwarzer, United States District Judge for the Northern District of California, in a recent article, has strongly advocated an active role for courts confronted with incompetent counsel: see Schwarzer, "Dealing with Incompetent Counsel – The Trial Judge's Role" (1980), 93 Harv. L. Rev. 633.

[172] The courts in Canada, on occasion, have had to deal with the issue of the competence of counsel, although usually as a ground of appeal: see Grunis, "Incompetence of Defence Counsel in Criminal Cases" (1973-74), 16 Crim. L.Q. 288.

For a recent Canadian case where the trial judge declared a mistrial because of

will be pressed with skill and determination. It will prove most beneficial, however, in class actions in which the claims of the class members, including the claim of the class representative, are individually nonrecoverable. In these kinds of case, the class representative will have little incentive to oversee or to control the lawyer for the class, since, by definition, the representative will have but a modest economic interest in the suit.[173] Consequently, a judicial review of the competence of the class lawyer at an early stage in the action will help to guarantee that the interests of the absent class members will be adequately represented.

Having concluded that the court should be empowered to make a determination regarding the adequacy of representation to be provided not only by the class representative but also by his counsel, the question becomes what onus should be imposed upon the class representative and his lawyer with respect to the latter's adequacy at the certification stage of the class litigation. There are a number of statutory precedents dealing with this particular issue, and a brief examination of them at this juncture may be useful.

Perhaps the most explicit provision, although it may not be the most onerous, is the adequacy of representation test contained in Professor Williams' Model Consumer Class Actions Act.[174] One of the prerequisites for

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counsel's incompetence in a civil case, see *Brisseau v. Martin & Robertson Ltd.*, [1978] 6 W.W.R. 383, 8 C.P.C. 93 (B.C.S.C.). This case was reversed on appeal: see *Geller v. Brisseau*, [1979] 6 W.W.R. 416 (B.C.C.A.). The Court of Appeal suggested that a trial judge, sitting without a jury, has no authority to grant a mistrial because of the incompetence of counsel.

[173] This point is well made in the following comments from Harvard Developments, *supra*, note 33, at 1577-78 (footnotes omitted):

> The American Bar Association's *Code of Professional Responsibility* reflects the traditional understanding of the role of the lawyer in individual-plaintiff litigation. The lawyer is sought out by a person with a recoverable claim; through conferences with his client, the lawyer develops a view of his client's interest; the lawyer single-mindedly advocates this interest within the rather commodious limits necessitated by the lawyer's alternative role as an officer of the court; if the lawyer wins the case, he is paid according to an individually bargained contract between lawyer and client; if not, the client may pay the lawyer nothing, but, in any event, the client is ultimately liable for the expenses of the litigation.
>
> In the class suit, especially one aggregating nonrecoverable claims, these traditional assumptions are inapposite. The holder of a nonrecoverable claim will not have a financial incentive to underwrite the costs of litigation, and may have no incentive even to spend the time necessary to select a lawyer. If he should find an attorney interested in his problem, that attorney will nonetheless be unwilling to go to court unless a class can be formed – an adequate fee may come only from the fund that litigation might create. The lawyer's fee will generally not be set by a bargain between 'client' and attorney, but by a court if the attorney wins or settles; there will be no fee if the attorney is unsuccessful. Nor can the named plaintiff demand that single-minded allegiance of his attorney envisioned by the traditional model. The attorney is the representative for the class and it is improper for him to ignore the interests of absentees. On the other hand, no very clear idea of precisely what is meant by a duty to represent a class has emerged, especially where the class is organized only for the purpose of trying a common legal question.

[174] See Williams' Model Act, *supra*, note 34.

certification set out in that draft statute is that "the representative party will fairly and adequately protect the interests of the class".[175] Section 4(1)(a) provides that, in determining the adequacy of the class representative, the court may consider "if the plaintiff is represented by counsel, whether such counsel has sufficient skill and experience to adequately present the claim made on behalf of the class". There are two noteworthy aspects of this provision. First, it is not clear whether the reference to counsel's experience would limit the court's inquiry to counsel's experience with class actions alone. As we shall see below, such a provision was contained in one class action proposal in the United States. Secondly, it is significant that the court is given a discretion whether to examine the credentials of the class representative's counsel; section 4(1) states that "the court may consider" the skill and experience of the class lawyer.

The American Uniform Class Actions Act,[176] and the most recent class action proposal of the Office for Improvements in the Administration of Justice of the United States Department of Justice, have taken a similar approach to judicial scrutiny of class counsel. As we have seen, section 2(b)(3) of the Uniform Class Actions Act states that the court may certify a class action if it is satisfied that "the representative parties fairly and adequately will protect the interests of the class". Section 3(b)(1) of this statute, in turn, *requires* the court to find that "the attorney for the representative parties will adequately represent the interests of the class" before it can make any determination pursuant to section 2(b). Section 3022(b)(4) of Bill H.R. 5103[177] would have made a finding that "the class representative and his counsel . . . will adequately protect the interests of . . . the class" a precondition to certification of a class compensatory action. However, unlike Bill S. 3475, which preceded it, Bill H.R. 5103 did not make mandatory an affidavit from class counsel stating "the extent of counsel's experience with public actions and class or complex litigation".[178]

The adequacy of representation provisions of the Draft Bill for a Class Actions Act proposed by the Law Reform Committee of South Australia,[179] it is suggested, fall somewhere between the Williams proposal and the American legislation considered above. That "[t]he representative parties will fairly and adequately protect the interests of the class"[180] once again is set up as a prerequisite to certification of a class action. However, the adequacy of the class representative's counsel is not raised to the level of a condition for certification. Rather, section 4(1) of the Draft Bill states as follows:

> 4.-(1) In determining whether the representative plaintiff will fairly and adequately protect the interests of the class for the purpose of section 2(3) the

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[175] *Ibid.*, s. 2(4).

[176] U.C.A.A., *supra*, note 52.

[177] See O.I.A.J. Bill H.R. 5103, *supra*, note 18.

[178] See O.I.A.J. Bill S. 3475, *supra*, note 17, §3022(a)(1).

[179] See South Australia Draft Bill, *supra*, note 35.

[180] *Ibid.*, s. 2(3).

> Court may consider whether provision has been made for legal representation that is adequate for the protection of the interests of the class.

Significantly, the court is given a discretion to consider the arrangements made by the class representative for "legal representation that is adequate for the protection of the interests of the class".

In our opinion, section 4(1) properly balances the interests of all concerned. The lawyer who agrees to represent the class can take comfort in the fact that an in-depth examination of his qualifications and capabilities is unlikely to be undertaken by the court unless it has reason to believe that counsel is not adequate. The possibility of judicial scrutiny, on the other hand, will serve to discourage neophytes from undertaking complex and difficult class actions. In these two ways, the absent class members in the vast majority of class actions can be assured of adequate protection of their rights and interests. We do not believe that the adequacy of the class lawyer should be put on any higher level. Therefore, we recommend that, as a prerequisite to certification of a class action, the court should be required to find that the representative plaintiff will fairly and adequately protect the interests of the class and, in determining this issue, the court may consider whether provision has been made for competent legal representation that is adequate for the protection of the interests of the class.[181]

(iv) Substitution of the Representative Plaintiff

Before concluding our discussion of the adequacy of representation requirement to be included in the proposed *Class Actions Act*, we wish to add a few comments on the effect on a class action of a finding by the court that this particular requirement is not satisfied at the time of the certification hearing or after the action has been certified. As we pointed out in chapter 2, there is some suggestion in the case law that a court can substitute another member of the class as representative plaintiff if it can be shown that the latter does not truly represent the class.[182] On the other hand, in the recent case of *Abraham v. Prosoccer Ltd.*,[183] the Court refused to permit another shareholder to take over a derivative suit where the representative plaintiff had settled his claim with the defendant.

Precedents for a provision permitting substitution of the representative plaintiff may be found in many of the recent class action proposals. For example, section 4(2) of the Draft Bill for a Class Actions Act, proposed by the Law Reform Committee of South Australia,[184] reads as follows:

> 4.-(2) If at any time after the Court has determined that the action is to be maintained as a class action it appears to the Court that the representative

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[181] See Draft Bill, ss. 3(3)(*e*) and 5.

[182] See, *supra*, ch. 2, sec. 2(c)(iii)c., and *Moon v. Atherton*, [1972] 2 Q.B. 435, [1972] 3 W.L.R. 57 (C.A.).

[183] (1980), 31 O.R. (2d) 475 (H.C.J.). Leave to appeal to the Ontario Court of Appeal has been granted.

[184] South Australia Draft Bill, *supra*, note 35.

plaintiff will not fairly and adequately protect the interests of the class the Court shall –

(*a*) set aside the order that the action is to be maintained as a class action and make all such amendments to the proceedings as will eliminate therefrom all reference to representation of absent persons, and may make such other consequential orders as may be just and expedient; or

(*b*) substitute for the representative plaintiff any member of the class who consents to be so substituted and who in the opinion of the Court will fairly and adequately protect the interests of the class.

Substitution, it would appear, may be allowed only after an action has been certified or, in other words, only after the court has concluded that the putative representative plaintiff was an adequate representative. In this respect, the South Australia proposal is identical to the Model Consumer Class Actions Act proposed by Professor Williams.[185]

Although not quite so explicit, the class action provisions of the Quebec *Code of Civil Procedure*[186] also deal with the possible replacement of a class representative. Article 1024 of the *Code* states as follows:

1024. A member may, by motion, apply to the court to have himself or another member substituted for the representative.

The court may substitute the applicant or another member consenting thereto for the representative if it is of the opinion that the latter is no longer in a position to represent the members adequately.

The substituted representative accepts the trial at the stage it has then reached; he may, with the authorization of the court, refuse to ratify the proceedings already had if they have caused an irreparable prejudice to the members. He cannot be bound to pay the costs and other expenses for proceedings prior to the substitution, unless the court orders otherwise.

It is unclear whether an order for substitution of the class representative may be secured at any time in the life of a class action. Specifically, since article 1024 appears in that part of the *Code of Civil Procedure* concerned with the conduct of a class action, it may well be that substitution is not possible at the certification stage of an action.

In our view, both the South Australia proposals and the Quebec provision respecting the replacement of a class representative are deficient insofar as they contemplate substitution only after the court has certified the action as a class action. The interests of the absent class members would seem to be best protected by a general power in the court to permit replacement of the class representative at any time, including the certification stage of the proceedings. Therefore, the Commission recommends that, at any time in an action under the proposed *Class Actions Act*, where the court finds that the representative plaintiff does not fairly and adequately protect the interests of the class, or will not do so, it should be able to make an order substituting another member of the class as the representative plaintiff.[187]

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[185] Williams' Model Act, *supra*, note 34, s. 4(2)(a).

[186] C.C.P., *supra*, note 29.

[187] See Draft Bill, s. 13.

Under this recommendation, a court would be able to substitute another class member for the representative plaintiff in a variety of circumstances. For example, where the representative plaintiff has agreed with the defendant to settle his personal claim,[188] another class member would be permitted to step into the shoes of the representative plaintiff and continue the action, assuming that the court finds that he will fairly and adequately represent the class. Similarly, where the claim of the representative plaintiff becomes moot,[189] the interests of the class may be protected by permitting another class member to assume carriage of the action.

Finally, it will be recalled that the Commission earlier recommended that, in limited circumstances, the Attorney General should be able to assume the role of representative plaintiff, even though the government is not a member of the class on whose behalf the action is brought.[190] We proposed that the Attorney General should be able to apply to be the representative plaintiff, and that the court should be able to invite him to act in that capacity, where it is in the public interest and either the representative will not fairly and adequately protect the interests of the class or the representative plaintiff consents thereto. These proposals, in our view, should provide absent class members with added protection insofar as the adequacy of representation requirement is concerned.

(d) Intervention

In this section, we shall examine another device for securing adequacy of representation for some or all of the members of a class, namely, intervention. It will be recalled that, in chapter 6 of this Report, the Commission recommended that the Attorney General should, in certain circumstances, be able to intervene in a class action to make submissions concerning the public interest.[191] At this point, we wish to consider the right of absent class members to intervene in class proceedings.

The right of a person to participate in an action in which he is neither a plaintiff nor a defendant is an area of the law of civil procedure that is, at best, uncertain. The case law would appear to draw a distinction between circumstances in which a person's proprietary rights might be affected by the litigation and circumstances in which only a commercial interest would be affected thereby.[192] The right to intervene has been restricted to the former

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[188] For a discussion of settlement of the representative plaintiff's claim, see *infra*, ch. 20.

[189] The effect on certification of the representative plaintiff's claim becoming moot has been a thorny issue in the United States. For a discussion of this issue, see Bledsoe, *supra*, note 119; Kane, *supra*, note 119; and Schneider, "*Goodman v. Schlesinger* and the Headless Class Action" (1980), 60 B.U. L. Rev. 348. For the pronouncements of the United States Supreme Court in respect of this matter, see *Sosna v. Iowa*, 419 U.S. 393 (1975), and *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976).

[190] See *supra*, ch. 6, sec. 1(b)(v), and Draft Bill, s. 14.

[191] See *supra*, ch. 6, sec. 1(b)(v).

[192] For a discussion of the subject of intervention, see Williston and Rolls, *The Law of Civil Procedure* (1970), Vol. 1, at 257-64. Many of the cases are gathered under the discussion of r. 136 of the Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540, in Gale, Marriott, and Hemmerick (eds.), *Holmested and Gale on The Judicature Act of Ontario and Rules of Practice* (1980), Vol. 2.

type of situation. The reigning confusion respecting the right to intervene would be greatly minimized by Rule 15 of the Proposed Rules of Civil Procedure recommended by the Civil Procedure Revision Committee in its 1980 Report.[193] Rule 15 provides in part as follows:[194]

> 15.01(1) Where any person, who is not a party to a proceeding, claims an interest in the subject matter of the proceeding or that he may be adversely affected by a judgment in the proceeding or that there exists between himself and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding, he may apply to the court for leave to intervene therein as an added party.
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> . . . .
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> 15.02 Any person may, with leave of the court and without becoming a party to the proceeding, intervene therein as a friend of the court for the purpose of rendering assistance to the court by way of argument.

In the context of class actions, such a right of intervention may prove useful in determining the adequacy of representation issue on the certification application and, even after an action has been certified, in guaranteeing adequate representation for the class members.

The importance of a right to intervene is recognized expressly in a number of class action mechanisms, including Rule 23 of the United States Federal Rules of Civil Procedure,[195] the American Uniform Class Actions Act,[196] and a number of state class action provisions.[197] None of the Commonwealth class action proposals that we have examined, on the other hand, has specifically addressed this issue. At this juncture, a brief review of the legislation may be appropriate.

Rule 23 deals with the subject of intervention in subdivision (d), which is

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[193] See Williston Committee Rules, *supra*, note 156.

[194] The courts, under this rule, would be given a broad discretion to permit a stranger to an action to intervene in the proceedings. Rule 15.01(2) states:

> 15.01(2) On any such motion, the court shall consider whether or not the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add such person as a party to the proceeding and may make such order as to pleadings, production and discovery and impose such conditions as to costs or otherwise as may seem just.

[195] Fed. R. Civ. P. 23(d)(2). The United States Federal Rules of Civil Procedure also contain a general intervention rule: see Fed. R. Civ. P. 24. The importance of a right of intervention in class suits is described in Wright and Miller, *supra*, note 13, Vol. 7A, §1799, at 252, as follows:

> Intervention in a Rule 23 action is directly related to the importance of assuring that the class is adequately represented and enabling those class members on the outside of the litigation to function as effective watchdogs to make certain that the action is fully and fairly conducted [footnotes omitted].

[196] U.C.A.A., *supra*, note 52, §9(a)(2)(iii).

[197] See, for example, N.Y. Civ. Prac. Law §907.2 (McKinney), and Illinois Civil Practice Act, Ill. Ann. Stat. ch. 110, §57.5(a) (Smith-Hurd 1981 Supp.).

concerned with the conduct of class actions. Pursuant to Rule 23(d)(2), a court is authorized to order that notice be given "of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims . . . or otherwise to come into the action", if it is of the view that this is necessary "for the protection of the members of the class or otherwise for the fair conduct of the action". Rule 23(d)(3) empowers the court to impose conditions on any person it allows to intervene in the class action. The provision in the Uniform Class Actions Act is to the same effect.[198] Section 57.5(a) of the Illinois Civil Practice Act contains a somewhat differently worded provision, although its objects would appear to be the same as the intervention provisions of Rule 23 and the Uniform Class Actions Act. That section reads as follows:[199]

> 57.5(a) Intervention. Any class member seeking to intervene or otherwise appear in the action may do so with leave of court and said leave shall be liberally granted except when the court finds that said intervention will disrupt the conduct of the action or otherwise prejudice the rights of the parties or the class.

The Commission believes that the proposed *Class Actions Act* should empower the courts to permit class members to intervene in the class proceedings, including the certification application. Such a power would be an additional safeguard for absent class members concerned with the adequacy of representation of the class representative, and with any particular issue that might arise during the course of the proceedings. A broad discretion in the courts to permit absent class members to intervene will enable the court to fix the degree of participation by the intervenors and to impose any conditions necessary to ensure that their intervention does not prejudice the conduct of the action by the parties.[200] Accordingly, we recommend that, for the purpose of ensuring the fair and adequate protection of the interests of the class, or for any other appropriate reason, the court, at any time in the class proceedings, should be empowered to permit any member of the class to intervene upon such terms and conditions as the court considers proper.[201]

5. TYPICALITY

(a) Introduction

The last of the formal prerequisites to the bringing of a class action that the Commission has considered focuses upon the relationship between the

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[198] See U.C.A.A., *supra*, note 52, §9(a)(2)(iii), which, like subdivision (d)(2) of r. 23, appears in the section of the Act concerned with the conduct of class actions and notice.

[199] This provision is similar in some respects to r. 15.01(2) of the Williston Committee Rules, *supra*, note 156, set out *supra*, note 194.

[200] Where the court is concerned about the adequacy of the representation that will be afforded to class members in any given case, the court may wish to solicit the views of the class members, and permit intervention for this reason. In such a case, the court could order that notice be given to all or some of the members of the class under the general notice provision recommended in chapter 13: see *infra*, ch. 13, sec. 4(c).

[201] See Draft Bill, s. 12(1).

class representative's claim and the claims of the members of the class. The "typicality" requirement – as it is frequently referred to in other jurisdictions – is concerned with whether the claim of the class representative is typical of the claims of the class members. Rule 75 of the present Supreme Court of Ontario Rules of Practice contains no express typicality requirement, although it may be argued that this issue is subsumed under the "same interest" requirement discussed briefly in a previous section of this chapter.[202]

By contrast, Rule 23 of the United States Federal Rules of Civil Procedure does contain an express typicality requirement. Rule 23(a)(3) provides that "[o]ne or more members of a class may sue . . . as representative parties on behalf of all only if . . . (3) the claims . . . of the representative parties are typical of the claims . . . of the class". This particular threshold requirement to the bringing of a class action under Rule 23 has given rise to some controversy. Before making our recommendation in this regard, it may be helpful to sketch briefly the typicality debate that has taken place in the United States.

(b) Typicality and the United States Jurisprudence

(i) The Debate

Typicality was made a prerequisite to the maintenance of a class action under the Federal Rules of Civil Procedure in 1966, when Rule 23 was substantially amended. It is surprising, considering that no such precondition had previously been imposed upon class suits, that the Notes of the Advisory Committee on Civil Rules contain no comment on Rule 23(a)(3).[203] Some courts have ignored this requirement,[204] or concluded, without any discussion, that it has been satisfied.[205] Other courts, however, have sought to give

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[202] See *supra*, this ch., sec. 3(a). It will be recalled that the most authoritative interpretation of this phrase, that of Lord Macnaghten in *Duke of Bedford v. Ellis, supra*, note 37, at 8, refers to three elements making up the same interest requirement. Lord Macnaghten outlined these three elements as follows (emphasis added):

> Given a *common interest* and a *common grievance*, a representative suit was in order if the *relief sought was in its nature beneficial to all* whom the plaintiff proposed to represent.

Arguably, the three elements referred to by Lord Macnaghten may be equated with a typicality requirement.

[203] See Advisory Committee on Civil Rules, "Proposed Amendments to the Rules of Civil Procedure for the United States District Courts", 39 F.R.D. 69 (1966). Some indication of the intention of the drafters of Rule 23 respecting typicality may be garnered from the comments of the former Recorder to the Advisory Committee on Civil Rules, Benjamin Kaplan. See Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)" (1967), 81 Harv. L. Rev. 356, at 387, *n.* 120, where it is stated that "[c]lause (3) of subdivision (a) emphasizes that the representatives ought to be squarely aligned in interest with the represented group".

[204] For a discussion of this point, see Smith, "Federal Civil Procedure – Class Actions – Rule 23(a)(3) Typicality Requirement Has Independent Meaning" (1976), 25 Kan. L. Rev. 126, at 129, *n.* 31.

[205] See the cases cited in Wright and Miller, *supra*, note 13, §1764, at 612, *n.* 15.

the typicality prerequisite some meaning. Unfortunately, these judicial efforts have not been entirely successful: courts often have equated typicality with the adequacy of representation requirement in Rule 23(a)(4) or with the commonality requirement, discussed earlier. Another line of authorities would require the class representative, in the name of typicality, to establish the existence of a class. We turn to a brief examination of these various attempts to pour content into the typicality bottle to determine whether a typicality requirement would serve any useful function in the Commission's proposed *Class Actions Act*.

(ii) Typicality and Adequacy of Representation

While one Court has stated flatly that the typicality requirement in Rule 23 was "designed to buttress the fair representation requirement in Rule 23(a)(4)",[206] other courts have been somewhat more circumspect. For example, the Court in *Taylor v. Safeway Stores, Inc.*,[207] a case to which we shall return below, stated as follows:[208]

> The guiding rationale for many of the judicial interpretations of the typicality requirement has been the historical nexus between subsections (a)(3) and (a)(4); both of these subsections were derived from a common phrase in the original Rule 23 requiring 'one or more [representatives], as will fairly insure the adequate representation of all . . . .' Because of its source in the original rule, subsection (a)(3) should logically deal with the adequacy of representation . . . .

Many of the tests that have been adopted by the courts to determine whether the class representative's claim is sufficiently typical reflect this identification of the typicality requirement in Rule 23(a)(3) with the requirement in Rule 23(a)(4) that "the representative parties will fairly and adequately protect the interests of the class".

Some courts, for example, have concluded that the typicality requirement will be satisfied if there is no conflict between the class representative's interests and the interests of the class members in the litigation.[209] Unquestionably, such a test would substantially duplicate any adequacy of representation requirement imposed upon the class representative. This point was made very clearly in the case of *Tober v. Charnita, Inc.*,[210] where it was said:[211]

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[206] *Rosado v. Wyman*, 322 F. Supp. 1173 (E.D.N.Y. 1970), at 1193.

[207] *Taylor v. Safeway Stores, Inc.*, 524 F. 2d 263 (10th Cir. 1975).

[208] *Ibid.*, at 269-70.

[209] This test has been referred to as the "no conflict" test: see Smith, *supra*, note 204, at 131; the "lack of adversity" test: see Wright and Miller, *supra*, note 13, §1764, at 611, and Moore, *supra*, note 57, ¶23.06-2, at 23-186 - 23-188; and "the absence of antagonistic interests" test: see Newberg, *supra*, note 10, §1115f, at 191-93. Another commentator has stated that the typicality requirement of r. 23 was included to ensure that the class representative would not take "any actions inimical" to the interests of the class: see Donelan, *supra*, note 12, at 534. See, also, Steininger, "Class Actions: Defining the Typical and Representative Plaintiff under Subsections (a)(3) and (4) of Federal Rule 23" (1973), 53 B.U. L. Rev. 406.

[210] 58 F.R.D. 74 (M.D. Pa. 1973).

[211] *Ibid.*, at 80.

> There has never been an exact definition of the degree of 'typical' required by 23(a)(3). Those courts which have suggested an applicable standard equate the requirement of 'typical' with the lack of adversity between the class members which is also a standard used to determine whether the representative plaintiffs will fairly and adequately protect the interests of the class as required by 23(a)(4) . . . .

A second standard for typicality that has been adopted by some courts is the "co-extensive test", which requires the interests of the class representative to be co-extensive with those of the other class members.[212] This test, it should be noted, usually is considered to be a facet of the adequacy of representation requirement in Rule 23(a)(4).[213] The co-extensive test has been expressly rejected by some courts on the ground that, if it requires the class representative's claim to be identical to those of the other class members, it is too stringent.[214]

A third touchstone used by a few courts is the "benefits test", which is satisfied if the class members will "be helped" by the success of the class action brought on their behalf.[215] Interestingly, the "same interest" prerequisite in Rule 75 of the Supreme Court of Ontario Rules of Practice has been interpreted to require, as one of its constituent elements, that "the relief sought [is] in its nature beneficial to all whom the plaintiff [proposes] to represent".[216] Assuming that the class representative has met the adequacy of representation requirement, it is difficult to imagine a case in which the class members will not benefit in some way from a determination of the action in favour of the class. We should point out that the benefits test is not a subjective test "authorizing a judge to dismiss a class action . . . where he thinks some members of the class may prefer to leave the violation of their rights unremedied".[217]

(iii) Typicality and Common Questions

A number of commentators also have pointed to the substantial overlap

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[212] See Wright and Miller, *supra*, note 13, §1764, at 612-13; Moore, *supra*, note 57, ¶23.06-2, at 23-186; and Newberg, *supra*, note 10, §1115f, at 191-92.

[213] See Moore, *ibid.*, and Newberg, *ibid.* In *Sommers v. Abraham Lincoln Federal Savings and Loan Association, supra*, note 163, at 587, the Court commented that "the 'adequate representation' requirement insures that plaintiffs' interests are co-extensive with the class members . . .".

[214] See Wright and Miller, *supra*, note 13, §1764, at 613, and *In re Four Seasons Securities Laws Litigation*, 59 F.R.D. 667 (W.D. Okla. 1973), rev'd on other grounds 502 F.2d 834 (10th Cir. 1974), *cert.* denied 95 S. Ct. 516.

[215] See the discussion of this test in Smith, *supra*, note 204, at 130. This test, although not widely adopted, is noteworthy by reason of the fact that it was formulated by the Second Circuit Court of Appeals in the seminal case of *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968).

[216] See *Duke of Bedford v. Ellis, supra*, note 37, at 8.

[217] Moore, *supra*, note 57, ¶23.06-2, at 23-197, quoted with approval in *Cottrell v. Virginia Electric & Power Co.*, 62 F.R.D. 516 (E.D. Va. 1974). Compare *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir. 1972), vacated 409 U.S. 815 (1972).

between the typicality and common questions requirements of Rule 23.[218] This state of affairs, it has been suggested, is a result of the fact that the courts have imbued "typicality" with its simple dictionary meaning;[219] consequently, the typicality requirement has been deprived of "any independent status".[220] To the extent that typicality has been equated with the common questions requirement applicable to Rule 23(b)(3) class actions, it would seem that the latter "as a practical matter subsumes and renders unnecessary the typicality requirement".[221]

(iv) Typicality and the Existence of a Class

As mentioned earlier, some courts in the United States have suggested that the typicality requirement is intended to obligate the class representative to establish affirmatively the existence of a class. The leading case on point is *Taylor v. Safeway Stores, Inc.*,[222] a civil rights case. The Commission finds this approach to the requirement of typicality, relied upon for the most part in civil rights cases, to be objectionable for a number of reasons.

The first, and most serious, criticism of the *Taylor* interpretation of the typicality requirement in Rule 23(a)(3) is that, in order to establish the actual existence of other class members, a preliminary examination of individual questions would be necessary in some cases, in addition to the preliminary merits test for common questions that the Commission has recommended in chapter 7. For example, in a case such as *Naken v. General Motors of Canada Ltd.*,[223] where the owners of a certain kind of automobile are seeking damages as a result of reliance upon an alleged collateral warranty by the defendant, the court would be able to demand proof of actual reliance by some of the class members in order to determine the typicality issue. In our view, such an approach would be putting the cart before the horse.

Secondly, if the class representative were required to establish the actual existence of class members having the same grievance before discoveries have taken place,[224] the burden imposed on the class representative could be an awesome one in some cases. It will be recalled that the Commission, in considering the numerosity prerequisite that should be included in the proposed *Class Actions Act*, decided against a prescribed minimum class size

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[218] See Moore, *supra*, note 57, ¶23.06-2, at 23-189 - 23-190; *Newberg, supra*, note 10, §1115a, at 184, Vol. 4, §7516, at 14, and Vol. 5, §8152c, at 209; and Smith, *supra*, note 204, at 132.

[219] The *Shorter Oxford English Dictionary* (3d rev. ed.) defines "typical" as "having the qualities of a type or specimen; serving as a representative specimen of a class or kind".

[220] Smith, *supra*, note 204, at 132.

[221] "Proposed Federal Consumer Class Action Legislation - II" (1975), 4 C.A.R. 342, at 351.

[222] *Supra*, note 207. The approach adopted to typicality in this case is based on the decision of the Court in *White v. Gates Rubber Co.*, 53 F.R.D. 412 (D. Colo. 1971).

[223] *Supra*, note 8.

[224] The subject of examination for discovery in the class action context is discussed *infra*, ch. 16.

and any requirement that a class action should be allowed only if brought by a minimum number of named plaintiffs as representatives of the class.[225] We rejected these alternatives on the ground that they would operate as unwarranted impediments to the bringing of class actions. We believe that a requirement to establish the actual existence of class members would have a similar effect.[226] We would add that, if the *Taylor* approach to typicality is an attempt to screen out otherwise unmeritorious actions, the Commission already has recommended a preliminary merits test to achieve this objective,[227] a device that, in our opinion, is better suited for this purpose.

(c) Conclusion

Our review of the American jurisprudence and literature on the typicality requirement has convinced us that no such requirement need be included in the Commission's proposed *Class Actions Act*. To the extent that the typicality requirement may be said to overlap with the common questions prerequisite that we recommended earlier,[228] it would be redundant. If the typicality requirement is intended to ensure adequacy of representation by the class representative, again, under our proposals, it would clearly be unnecessary. Our recommendations in this regard, in our opinion, address all those issues that have been raised in the cases in which typicality and adequacy of representation have been equated. Insofar as typicality has been interpreted to require proof by the class representative of the actual existence of some or all class members, we have stated that such a requirement would present a formidable and inappropriate obstacle to class suits, one that the representative plaintiff in most cases would be unable to overcome at the certification hearing. Moreover, as we noted earlier, since the *Taylor* approach has been limited, more or less, to civil rights cases, it would seem inappropriate in a class action statute of general application, such as the one that we propose. We are strengthened in our view of the *Taylor* approach to typicality by the fact that it has met with less than universal approval.[229] Accordingly, we do not recommend the inclusion in the Commission's proposed *Class Actions Act* of a prerequisite similar to the one found in Rule 23(a)(3), that the "claims . . . of the representative parties are typical of the claims . . . of the class".

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[225] See *supra*, this ch., sec. 2(d).

[226] See Note, "Procedure – Federal Rule of Civil Procedure 23(a) – Typicality Requirement for Class Actions Reviewed" (1976), 80 Dick. L. Rev. 835, at 840.

[227] See *supra*, ch. 7.

[228] See *supra*, this ch. sec. 3(c)(v).

[229] See, for example, *Presseisen v. Swarthmore College*, 71 F.R.D. 34 (E.D. Pa. 1976), at 42, *n.* 9, and *Women's Committee for Equal Employment Opportunity v. National Broadcasting Co., Inc.*, 71 F.R.D. 666, at 670 (S.D.N.Y. 1976). Compare *Carter v. Newsday, Inc.*, 76 F.R.D. 9 (E.D.N.Y. 1976); *Nguyen Da Yen v. Kissinger*, 70 F.R.D. 656 (N.D. Cal. 1976); *Lim v. Citizens Savings and Loan Association*, 430 F. Supp. 802 (N.D. Cal. 1976); and *Jamerson v. Board of Trustees of the University of Alabama*, 80 F.R.D. 744 (N.D. Ala. 1978).

6. CLASS DEFINITION

While none of the class action precedents that we have examined requires expressly that the representative plaintiff define the class he purports to represent, this matter is clearly relevant to many of the issues to be decided at the certification hearing. For instance, a court will not be in a position to determine whether the class is numerous, or whether the class representative is an adequate representative, unless it knows on whose behalf the class representative purports to sue. The following remarks of one class action commentator outline the importance of the class definition at the certification stage of a class action:[230]

> An adequate class definition probably has the greatest value in connection with Rule 23(a). . . . If there is no class definition, or one which fails to establish class boundaries, a court cannot estimate the number of class members in order to determine whether joinder is impracticable. In addition to the scope of the class, the definition must include factual references to an alleged common question of law or fact, an allegation that the claims or defenses of the representatives are typical of the claims or defenses of the class, and an allegation that the representative parties will fairly and adequately protect the interests of the class.

In class actions brought pursuant to Rule 75 of the Supreme Court of Ontario Rules of Practice, it would appear that the class on whose behalf the action is brought should be specified as accurately as possible,[231] although it is not necessary to name the members of the class individually.[232]

With what degree of particularity, then, should the class representative have to describe the class? A number of courts and commentators have attempted to note in a general way the degree of precision necessary in a class definition for the purposes of Rule 23. For example, one view respecting class definition is as follows:[233]

> [T]he requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.

This view has been seen by some as too strict a standard, and the following supposedly more liberal test has been proposed instead:[234]

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[230] Comment, "Defining a Rule 23(b)(2) Class: An Expository Analysis" (1974), 12 San Diego L. Rev. 150, at 153-54. For other comments on the significance of class definition, see Donelan, *supra*, note 12, at 528 (respecting the binding effect of a class action judgment); Wright and Miller, *supra*, note 13, §1760, at 584 (respecting the binding effect of a class action settlement); and Special Project, "The Remedial Process in Institutional Reform Litigation" (1978), 78 Colum. L. Rev. 784, at 887 *et seq.* (respecting adequacy of representation).

[231] See *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36, at 41 ("proper description"), and *Markt & Co., Ltd. v. Knight Steamship Co., Ltd.*, *supra*, note 81, at 34 (class "should be defined").

[232] See *Leathley v. McAndrew & Co.*, [1875] W.N. 259.

[233] Wright and Miller, *supra*, note 13, §1760, at 581 (footnote omitted).

[234] Comment, *supra*, note 230, at 159 (footnote omitted).

> Courts subscribing to a 'liberal interpretation' would require a definition from which a membership can be objectively described at the time of judgment. The 'liberal interpretation' merely requires that the class be described by identifiable group characteristics, even though individual class members may be incapable of specific enumeration.

In our view, these two tests are fundamentally the same. Neither requires that all class members be specifically identified by name, or otherwise; rather, a class definition that would enable the court to determine whether any person coming forward was or was not a class member would seem to be sufficient. In our view, this is the law at present, and no explicit standard for a class definition is necessary.

Before leaving the subject of class definition, we wish to comment briefly on the practice of defining the class in a class action in terms of the conduct of the defendant or the transaction giving rise to the class suit. This question recently has been before the Court of Appeal for Ontario in *Naken v. General Motors of Canada Ltd.*,[235] and has given rise to some controversy.

In *Naken*, it will be remembered, the Ontario Court of Appeal permitted the action to go forward once the definition or description of the class was narrowed "to include only those purchasers of 1971 and 1972 Firenzas who saw the printed materials or published advertisements of General Motors and, as a result, purchased a new Firenza from a dealer".[236] The Court came to this conclusion despite the objections of counsel for the defendant that this particular class definition was one "in terms of the cause of action – that is, that the class suggested is composed of all those purchasers of 1971 and 1972 Firenzas who can establish a cause of action against General Motors".[237] Arnup J.A., speaking for the Court, did not deny that, once the common questions were determined in favour of the class, subsequent proceedings would be necessary to determine which Firenza purchasers came within the class definition.[238] The mere fact that the court may be required to enter upon a relatively elaborate factual investigation in order to determine class membership, it would seem from *Naken*, does not render the class definition any less adequate.

Finally, we should point out that a class description will be a necessary part of any order certifying an action as a class action,[239] as well as of any judgment on the questions common to the class.[240] We deal with these matters in subsequent chapters of this Report.

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[235] *Supra*, note 8.

[236] *Ibid.*, at 794.

[237] *Ibid.*, at 795.

[238] *Ibid.*, at 796.

[239] See *infra*, ch. 10, sec. 4(c)(i).

[240] See *infra*, ch. 18.

Recommendations

The Commission makes the following recommendations:

1. Before an action is certified as a class action, the court should be satisfied that the class is numerous.

2. Class actions under the proposed *Class Actions Act* should not be divided into categories similar to those established by Rule 23(b) of the United States Federal Rules of Civil Procedure; rather, all class actions should be treated alike, and should be subject to uniform rules with respect to such matters as commonality, superiority, notice, and the right of class members to exclude themselves from an action.

3. The court should certify an action as a class action only if it finds that the action raises questions of fact or law common to the members of the class.

4. Predominance of common questions over issues affecting individual members of the class should not be a prerequisite to the certification of an action as a class action, but rather should be one of the factors that the court should be required to weigh in determining the issue of superiority.

5. Except where the Attorney General assumes the role of representative plaintiff (see *supra*, ch. 6, Recommendation 3), the proposed *Class Actions Act* should require that the representative plaintiff be a member of the class on whose behalf the action is brought.

6. As a prerequisite to certification of an action as a class action, the court should be required to find that the representative plaintiff will fairly and adequately protect the interests of the class and, in determining this issue, the court may consider whether provision has been made for competent legal representation that is adequate for the protection of the interests of the class.

7. The representative plaintiff's financial resources should not be a relevant consideration in determining whether he will be an adequate representative for the class on whose behalf the action has been brought.

8. At any time in an action under the proposed *Class Actions Act*, where the court finds that the representative plaintiff does not fairly and adequately protect the interests of the class, or will not do so, it should be able to make an order substituting another member of the class as the representative plaintiff.

9. For the purpose of ensuring the fair and adequate protection of the interests of the class, or for any other appropriate reason, the court should be empowered to permit any member of the class to intervene in the class proceedings upon such terms and conditions as the court considers proper.

10. That the claim of the representative plaintiff is typical of the claims of the class that he purports to represent should not be a prerequisite to the certification of an action as a class action.

CHAPTER 9

CERTIFICATION: THE SUPERIORITY AND COST-BENEFIT TESTS

1. INTRODUCTION

In the preceding chapters of this Report, we considered a number of certification tests or requirements to be satisfied by an action before it should be allowed to proceed in class form. For example, in chapter 7, we recommended that every class action should be required to meet a preliminary merits test.[1] In chapter 8, we considered the formal prerequisites to the granting of class status, and recommended that all class actions should be required to satisfy numerosity, common questions, and adequacy of representation tests.[2] In this chapter, we shall consider whether the class representative responsible for the institution of a class action should be under an obligation to establish, at the certification hearing, that proceeding against the defendant in class form is superior to the other procedural alternatives open to the members of the class.

The need for some kind of superiority test as part of the certification process is attested to by the fact that most class action mechanisms similar to Rule 23 of the United States Federal Rules of Civil Procedure have addressed this question expressly.[3] We turn now to examine the superiority provisions contained in the class action legislation of other jurisdictions with a Rule 23 type of class action mechanism.

2. A SUPERIORITY TEST: THE LEGISLATIVE PRECEDENTS

We begin our survey of existing and proposed class action legislation containing a superiority test with an examination of the Rule 23 superiority provision and the case law engendered thereby. The reason for commencing this survey with Rule 23 is a very simple one: the superiority test in Rule 23(b)(3) has received a great deal of judicial scrutiny, and a close examination of the judicial decisions interpreting this requirement would be instructive.

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[1] See *supra*, ch. 7, sec. 4.

[2] See *supra*, ch. 8, secs. 2(d), 3(c)(v), and 4(c), respectively.

[3] For a discussion of the "superiority" provisions to be found in the legislation or proposals in other jurisdictions, see *infra*, this ch., sec. 2(b)-(h).

(a) Rule 23 of the United States Federal Rules of Civil Procedure

In reality, Rule 23 of the United States Federal Rules of Civil Procedure[4] contains two provisions concerned with the superiority of class actions brought under the Rule. The main superiority provision is to be found in subdivision (b)(3) of Rule 23, which reads as follows:

> 23 (b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . . .
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Reference also should be made to subdivision (a) of Rule 23, which includes a threshold numerosity test. Rule 23(a) provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable . . .". In other words, Rule 23(a)(1) requires proof of the superiority of a class action over joinder in all cases brought in class form pursuant to Rule 23. It will be recalled that, when we discussed the need for a numerosity requirement, we rejected making any reference in our test to joinder.[5] It was the opinion of the Commission that any such reference would restrict severely the flexibility of the class action procedure. Moreover, the Commission was of the view that the procedural alternative of joinder should not be singled out for consideration by the court determining the issue of certification. Rather, the court should give equal attention to other procedural techniques that might enable it to deal expeditiously and economically with the claims of the individuals forming a class. We shall return to this subject at a later juncture in this chapter.[6]

Insofar as the common questions predominance requirement found in Rule 23(b)(3) is concerned, we proposed, in chapter 8 of the Report, a simple common questions test for certification rather than a common questions predominance prerequisite.[7] Again, the Commission was concerned about imposing too onerous a requirement on the class representative at the certification stage of a class action. However, we did not dismiss entirely the possibility of court consideration of the predominance issue. Instead, we recommended that the predominance of common questions over questions

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[4] Fed. R. Civ. P. 23, promulgated at 383 U.S. 1029 (1966).

[5] See *supra*, ch. 8, sec. 2(d).

[6] See *infra*, this ch., sec. 3(b)(ii)d.

[7] See *supra*, ch. 8, sec. 3(c)(v).

affecting only individual members of the class should be examined in determining whether a class action is the superior procedural alternative for the resolution of the dispute. We shall deal specifically with this issue of predominance, too, at a later point in this chapter.[8]

Returning to the specific superiority requirement contained in Rule 23(b)(3), we shall consider first the purpose of this prerequisite to certification. The Advisory Committee responsible for the drafting of Rule 23 stated that it had incorporated a superiority requirement in the Rule with a view to serving the following ends:[9]

> That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages . . . . To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court find that that procedure is 'superior' to the others in the particular circumstances.

Some have suggested that this portion of the Rule requires the court, after considering what other procedures, if any, exist for disposing of the dispute before it, to compare these alternatives with a Rule 23 class action in order "to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court".[10] To put it another way, "[t]he fundamental issue turns on the best means to serve the public interest without undue advantage or harm to the litigants involved and with due regard to the capacity of the tribunal to undertake the assigned tasks".[11]

It also has been suggested that this judicial assessment of whether a better procedural mechanism is available may be "merely an aspect of the basic inquiry required by due process into the protection of absentees' interests".[12] Another commentator has expressed the view that the obligation to find the class action device superior to other methods of resolving the dispute "is reminiscent of the equitable origin of the class action in that it may be barred if an adequate remedy at law exists".[13]

In essence, the superiority requirement seems to impose upon the judge carrying out the certification review a duty to analyze the relative advantages

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[8] See *infra*, this ch., sec. 3(b)(ii)a.

[9] Advisory Committee on Civil Rules, "Proposed Amendments to the Rules of Civil Procedure for the United States District Courts", 39 F.R.D. 69 (1966), at 103.

[10] Wright and Miller, *Federal Practice and Procedure* (1972), Vol. 7A, §1779, at 59.

[11] *Schaffner v. Chemical Bank*, 339 F. Supp. 329 (S.D.N.Y. 1972), at 338.

[12] Note, "Proposed Rule 23: Class Actions Reclassified" (1965), 51 Va. L. Rev. 629, at 644.

[13] Cohn, "The New Federal Rules of Civil Procedure" (1966), 54 Geo. L.J. 1204, at 1216.

and disadvantages of class actions compared to the benefits and burdens of alternative means of resolving the dispute. Although, on its face, the Rule appears to restrict this analysis to a comparison of class actions with "other available methods for the fair and efficient adjudication of the controversy", the case law demonstrates that the courts have expanded the scope of this review to such an extent that some class actions have been denied certification because the court was convinced that their disadvantages outweighed their advantages, even though, as a practical matter, no effective alternative method of proceeding was available to the class members. The propriety of this expansion of the superiority requirement under Rule 23, and its desirability as a matter of policy, will be considered later in this chapter.[14]

Although the superiority question is only relevant in class actions brought under Rule 23(b)(3),[15] it should be noted that the court, by virtue of this provision, must make a positive finding regarding the superiority of each such class action "to other available methods for the fair and efficient adjudication of the controversy". Among the matters to which the court is directed to draw its attention under Rule 23(b)(3) are "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of a class action". This list is inclusive rather than exhaustive and, indeed, the courts have considered a host of factors in passing upon the superiority of a class action, including the access to justice function served by a particular class action, the economic impact of the class action upon the defendant in a given case, the deterrent effect of the class action upon the defendant, and the benefit, if any, to be realized by the class members as a result of the class action. These, and other factors, will be considered in more detail below.[16]

At this juncture, we turn to a consideration of the interpretation that the courts have given to paragraphs (A) to (D) of Rule 23(b)(3). It should be noted that it does not appear that a court must be satisfied on all four grounds;[17] rather, it seems that each of the factors listed in Rule 23(b)(3) may be relevant to the superiority issue.[18] In addition, a number of commentators have suggested that no single factor should be given exaggerated importance or should alone be determinative of this issue.[19] Instead, the court, in

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[14] See *infra*, this ch., sec. 2(a)(iv).

[15] It should be noted that the Commission, in ch. 8, sec. 3(b)(i), opposed the categorization of class actions in the manner of Rule 23 of the United States Federal Rules of Civil Procedure. The Commission has proposed that all class actions brought pursuant to the proposed *Class Actions Act* should have to meet the same requirements.

[16] See *infra*, this ch., sec. 2(a)(v).

[17] See Moore, *Federal Practice* (2d ed., 1980), Vol. 3B, ¶23.45[4.-0], at 23-360.

[18] *Ibid.* See, also, Wright and Miller, *supra*, note 10, Vol. 7A, §1780, at 64-65.

[19] See Newberg, *Newberg on Class Actions* (1977), Vol. 1, §1160, at 288; Wright and Miller, *supra*, note 10, Vol. 7A, §1780, at 64; and, Moore, *supra*, note 17, Vol. 3B, ¶23.45[4.-0], at 23-360.

considering the factors set out in subdivision (b)(3) of Rule 23, should "focus on the efficiency and economy elements of the class action so that the cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis".[20]

(i) Interest of Members in Individually Controlling the Litigation

It has been said of Rule 23(b)(3)(A) that "the interest of members of the class in individually controlling the prosecution or defense of separate actions" must be "something more than a mere desire of certain individuals to have their own separate lawsuits. An individual's interest should include a valid reason why he desires to conduct a separate suit if that interest is to weigh against the superiority of the class action."[21] Several courts have concluded that the interest of members in individually controlling the litigation is unimportant where the claims of the members of the class are individually nonrecoverable.[22]

Some courts, in weighing this factor, have taken into account the fact that members of the class with a strong interest in litigating their own claims will be able to opt out of the class under Rule 23(c)(2), which gives an automatic right of exclusion to members of a (b)(3) class.[23] However, it has been argued that it is improper to consider the right to opt out as a complete protection of a member's interest in litigating his own claim;[24] such an interpretation, it has been stated, would nullify the specific reference in Rule 23(b)(3) to control by the individual of his own litigation.[25] Similar comments have been made regarding the right of class members under Rule 23(c)(2)(C) to enter an appearance through counsel.[26]

There is also a division of opinion concerning the significance of the absence of individually initiated actions against the defendant in a class suit.

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[20] Wright and Miller, *supra*, note 10, Vol. 7A, §1780, at 64.

[21] Sabbey, "Rule 23: Categories of Subsection (b)" (1969), 10 B.C. Ind. & Com. L. Rev. 539, at 547.

[22] See Wright and Miller, *supra*, note 10, Vol. 7A, §1780, at 66. And see *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), at 301; *Vernon J. Rockler and Co., Inc. v. Graphic Enterprises, Inc.*, 52 F.R.D. 335 (D. Minn. 1971), at 346-47; and *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968), at 485. See, also, Sabbey, *supra*, note 21, at 547.

[23] See Newberg, *supra*, note 19, Vol. 1, §1160b, at 271, and Vol. 4, §7526a, at 50. See, also, *Tober v. Charnita, Inc.*, 58 F.R.D. 74 (M.D. Pa. 1973), at 85. The right of a class member to exclude himself from a class action is discussed *infra*, ch. 12.

[24] See Wright and Miller, *supra*, note 10, Vol. 7A, §1780, at 68, and "Developments" (1975), 4 C.A.R. 2, at 131. Compare "Proposed Federal Consumer Class Action Legislation - II" (1975), 4 C.A.R. 342, at 352.

[25] See Wright and Miller, *supra*, note 10, Vol. 7A, §1780, at 68.

[26] See Wright and Miller, *supra*, note 10, Vol. 7A, §1780, at 68. It may be difficult at the certification stage for class members to perceive the utility of the special procedures in Fed. R. Civ. P. 23(c)(2).

A number of courts[27] and some commentators[28] have expressed the view that a paucity of separate actions is indicative of lack of interest on the part of class members. On the other hand, at least one commentator has observed that the presence or absence of individually initiated suits or intervention by class members may or may not be relevant to the court's consideration of Rule 23(b)(3)(A).[29]

The courts have alluded to a number of other factors from which an interest in individual control of the litigation may be inferred. A "high degree of emotional involvement"[30] in the litigation, extremely large damage claims,[31] and a wide array of tactical and strategic choices in the litigation,[32] have been suggested as indicating a likelihood of individual interest. These factors, found most frequently in mass accident actions, would not seem to be determinative, however, as class actions have been permitted to go forward in a number of mass accident cases.[33]

(ii) Other Litigation

Mention already has been made of the possible significance under Rule 23(b)(3)(A) of the commencement of actions against the defendant in a class action by individual members of the class. Rule 23(b)(3)(B) makes specific reference to "the extent and nature of any litigation concerning the controversy already commenced by . . . members of the class", and the existence of individual suits certainly would seem to be relevant under this subdivision of Rule 23.[34]

Some courts, however, have tended to downplay the significance of other litigation involving the defendant and members of the class. At least one

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[27] See *Alameda Oil Co. v. Ideal Basic Industries, Inc.*, 326 F. Supp. 98 (D. Co. 1971), and *Fischer v. Kletz*, 41 F.R.D. 377 (S.D.N.Y. 1966).

[28] See Newberg, *supra*, note 19, Vol. 5, §8826a, at 890, and Sabbey, *supra*, note 21, at 547.

[29] Wright and Miller, *supra*, note 10, Vol. 7A, §1780, at 68.

[30] See Newberg, *supra*, note 19, Vol. 1, §1160b, at 272, and "Developments" (1975), 4 C.A.R. 377, at 422. See, also, *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76 (E.D. Pa. 1970).

[31] See *Hobbs v. Northeast Airlines, Inc.*, *ibid.*, at 79.

[32] See Newberg, *supra*, note 19, Vol. 1, §1160b, at 271.

[33] The following cases were certified with respect to the common issues concerning liability in relation to, for example, airline disasters and food poisoning, with the individual issues relating to causation and damages to be tried separately: *Bentkowski v. Marfuerza Compania Maritima*, 70 F.R.D. 401 (E.D. Pa. 1976); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla. 1973), aff'd mem. 507 F.2d 1278 (5th Cir. 1975); *Petition of Gabel*, 350 F. Supp. 624 (C.D. Cal. 1972), specifically rejected in *McDonnell Douglas Corp. v. U.S. Dist. Ct., supra*, note 337; *American Trading & Prod. Corp. v. Fischbach & Moore, Inc.*, 47 F.R.D. 155 (N.D. Ill. 1969); and *Williams v. State of Louisiana*, 350 So.2d 131 (La. Supr. Ct. 1977).

[34] See Wright and Miller, *supra*, note 10, Vol. 7A, §1780, at 70; Newberg, *supra*, note 19, Vol. 1, §1160c, at 273; and "Proposed Federal Consumer Class Action Legislation - II" (1975), 4 C.A.R. 342, at 352.

court has adopted the view that significance should be attached to related pending litigation only where the litigation is close to conclusion or where the number of separate suits is substantial.[35]

(iii) Concentrating the Litigation in a Particular Forum

While the factor described in Rule 23(b)(3)(C) – "the desirability or undesirability of concentrating the litigation of the claims in the particular forum" – has often been discussed in terms of judicial economy,[36] a number of commentators have expressed the opinion that the emphasis should be on the particular forum selected by the class representative, rather than on judicial economy.[37] It also has been suggested that the word "forum", used in Rule 23(b)(3)(C), is intended to direct the court's attention to the possibility of the action being heard in a state court or by some administrative agency, rather than in a federal court.[38]

(iv) Manageability

Unquestionably, the most important[39] of the four factors relating to superiority expressly mentioned in Rule 23(b)(3) is found in paragraph (D), concerned with "the difficulties likely to be encountered in the management of a class action". This aspect of the superiority requirement is referred to generally as the manageability issue. Application of the manageability test has been complicated by the lack of any clear and comprehensive statement of the purpose and scope of this part of Rule 23. One of the broadest statements of the scope of Rule 23(b)(3)(D) is to be found in *Eisen v. Carlisle & Jacquelin*,[40] in which a majority of the Supreme Court of the United States observed that manageability "encompasses the whole range of practical

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[35] See *Frankel v. Wyllie and Thornhill, Inc.*, 55 F.R.D. 330 (W.D. Va. 1972), at 336-37. It has been pointed out, for example, that a great many separate actions may well indicate the economies to be realized from class proceedings: see Newberg, *supra*, note 19, Vol. 1, §1160c, at 273, and Vol. 4, §7526b, at 50, and Wright and Miller, *supra*, note 10, Vol. 7A, §1780, at 69-70.

[36] See Sabbey, *supra*, note 21, at 548.

[37] See Newberg, *supra*, note 19, Vol. 1, §1160d, at 273. Under Fed. R. Civ. P. 23(b)(3)(C), a court should perhaps consider such matters as the location of the claimants, the location of the witnesses, and the condition of the court calendar: see Wright and Miller, *supra*, note 10, Vol. 7A, §1780, at 72-73; Moore, *supra*, note 17, Vol. 3B, ¶23.45[4.-3], at 23-367 – 23-370. And see *Fischer v. Kletz*, *supra*, note 27, at 385. Compare Newberg, *supra*, note 19, Vol. 1, §1160d, at 273-74: such matters "are not relevant to the class action determination, because a class action may be proper though a change of venue is proper as well . . . . This factor should be of little or no significance in resolving the superiority issue".

[38] See Moore, *supra*, note 17, Vol. 3B, ¶23.45[4.-3], at 23-368, and Wright and Miller, *supra*, note 10, Vol. 7A, §1780, at 73.

[39] See Schuck, "Class Actions Maintainable", in Practicing Law Institute, *Class Actions* (1973) 137.

[40] 417 U.S. 156 (1974).

problems that may render the class action format inappropriate for a particular suit".[41]

At the present time, there is some dispute about whether Rule 23(b)(3)(D) authorizes a court to refuse to certify an action on the ground that it is unmanageable where no other practical alternative exists for "the fair and efficient adjudication of the controversy". There does appear to be agreement that, when considering the manageability of a class action, a court should not lose sight of management difficulties that might be engendered by alternative modes of adjudication, where available.[42] Some courts, however, have gone further, and have suggested that management difficulties are significant only when they make class actions less fair and efficient than other available alternatives.[43]

On its face, Rule 23 would clearly seem to restrict a judge's authority to refuse to certify a class action on the basis of the superiority requirement to situations where "other available methods for the fair and efficient adjudication of the controversy" in fact exist. There is no mention of a power to refuse to certify because a class action that provides victims of a mass wrong with their only feasible avenue of relief is otherwise not in the public interest. Judicial support for such an interpretation may be found in the following remarks of Judge Lord in *In re Antibiotic Antitrust Actions*:[44]

> Finally, there is the question of whether difficulties in the management of these actions preclude a finding that the class action is 'superior to *other available methods* for the fair and efficient adjudication of the controversy' . . . . It should be noted at the outset that difficulties in management are of significance only if they make the class action a *less* 'fair and efficient' method of adjudication than other available techniques. This perspective is particularly important in the present case where the defendants, after reciting potential manageability problems, seem to conclude that no remedy is better than an imperfect one. The court would be hesitant to conclude that conspiring defendants may freely engage in predatory price practices to the detriment of millions of individual consumers and then claim the freedom to keep their ill-gotten gains which, once lodged in the corporate coffers, are said to become a 'pot of gold' inaccessible to the mulcted consumers because they are many and their individual claims small.

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[41] *Ibid.*, at 164.

[42] See Wright and Miller, *supra*, note 10, Vol. 7A, §1780, at 75-76; Newberg, *supra*, note 19, Vol. 1, §1160e, at 274-75; and Sabbey, *supra*, note 21, at 548. See, also, *Brennan v. Midwestern United Life Insurance Co.*, 259 F. Supp. 673 (N.D. Ind. 1966), at 684.

[43] See *In re Ampicillin Antitrust Litigation*, 55 F.R.D. 269 (D.C. 1972), at 277. The Court in *In re Sugar Industry Antitrust Litigation*, 73 F R.D. 322 (E.D. Pa. 1976), at 358, stated as follows:

> The federal bench and bar must remain cognizant of the fact that difficulties in the management of class actions should not lead to a conclusion that class actions are not superior to other available means for the fair and efficient adjudication of the controversy. Manageability problems are significant only if they create a situation that is less fair and efficient than other available techniques . . . . This perspective is important in this litigation because defendants, after reciting potential manageability hassles, offer no other remedy that is better than this purportedly imperfect one.

[44] 333 F. Supp. 278 (S.D.N.Y. 1971), at 282-83 (emphasis in original).

Nevertheless, it is clear that many American courts[45] have assumed a power to refuse to certify class actions in the name of superiority in cases where, as a practical matter, no alternative remedy was truly available because the claims were individually nonrecoverable. In making such determinations, courts have been influenced by factors that they have treated as problems of manageability, such as the large size of a particular class, or the likelihood that class members would receive no net financial benefit after the costs of the proceedings were deducted from the recovery. We shall say more about this cost-benefit analysis undertaken by some courts in the United States in a later section of this chapter.[46]

Having discussed briefly the purpose and scope of the manageability component of Rule 23(b)(3), it would seem appropriate at this point to examine some of the factors frequently cited and discussed by the courts under this rubric. The factors to be examined are the following: (1) the burdens imposed on the administration of justice by individual issues in a class action; (2) the size of the class; (3) notice problems; (4) the lack of any benefit to the class members as a result of a class action; and (5) the availability of innovative management techniques and the possibility of conditional certification as means of overcoming management difficulties.

a. The Existence of Individual Issues

Many courts have refused to certify class actions on the ground that problems associated with the resolution of complex individual issues present in the suit would render the action unmanageable. It should be pointed out that, in the great majority of these cases,[47] the courts also have concluded that the actions did not satisfy the Rule 23(b)(3) requirement that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members". Under the Commission's proposals as well, the existence of individual issues would be a factor relevant to the superiority determination. However, unlike the situation under Rule 23(b)(3), a lack of predominance of common questions would not necessarily be fatal to the maintenance of a class action.[48]

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[45] See, for example, *Lah v. Shell Oil Co.*, 50 F.R.D. 198 (S.D. Ohio 1970); *Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y. 1972); *Partain v. First National Bank of Montgomery,* 59 F.R.D. 56 (M.D. Ala. 1973); and *Hackett v. General Host Corporation*, 455 F.2d 618 (3d Cir. 1972).

[46] See *infra*, this ch., sec. 3(a).

[47] See *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 64 F.R.D. 43 (D. Del. 1974); *Abercrombie v. Lum's, Inc.*, 345 F. Supp. 387 (S.D. Fla. 1972); *Boring v. Medusa Portland Cement Co.*, 63 F.R.D. 78 (M.D. Pa. 1974); *Cotchett v. Avis Rent A Car System, Inc., supra*, note 45; *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974); *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974); *Morris v. Burchard*, 51 F.R.D. 530 (S.D.N.Y. 1971); *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443 (M.D. Ga. 1975); *Schaffner v. Chemical Bank, supra*, note 11; *In re Transit Company Tire Antitrust Litigation*, 67 F.R.D. 59 (W.D. Mo. 1975); and *Gelman v. Westinghouse Electric Corp.*, 73 F.R.D. 60 (W.D. Pa. 1976).

[48] See *supra*, ch. 8, sec. 3(c)(v), where the Commission recommended that predominance of common questions should not be a threshold requirement to the maintenance of a class action.

b. The Size of the Class

In this section, we are not concerned with the minimum size of a class necessary to satisfy the proposed numerosity prerequisite; we already have dealt with this matter in chapter 8.[49] Rather, our focus is on the relevance to the manageability issue in Rule 23(b)(3) of a class of considerable size. The problems posed by a large class, insofar as the issues of superiority, and of manageability in particular, are concerned, are perhaps best described in the following comments of the Court in *Philadelphia Electric Co. v. Anaconda American Brass Co.*:[50]

> These objective[s] [relating to superiority] have some features of mutual inconsistency. The larger the potential class, the more advantageous it is for the litigants (on both sides), and the courts generally, to have common issues resolved finally in a single action. On the other hand, however, the larger the class, the more difficult the problems of management; particularly, at least in the early stages, problems of notice.

In other words, courts confronted with a class action involving a great many class members are faced with a dilemma. Certification will result in a class action that, from an administrative viewpoint, may well be unwieldly. Refusal to certify, at least in the case of a great many claims that are individually recoverable, will mean that the courts will likely be inundated by a large number of separate proceedings raising similar questions of fact or law.

Most of the case law in which class size has been considered relevant to the question of manageability is concerned with the burden that the administration of a large class action might impose on a particular court. In the case of *In re Hotel Telephone Charges*,[51] for example, where the class was composed of some forty million individuals, the Court noted that the processing of only a small percentage of all the claims on an individual basis would take many years.

While, in some cases, the sheer size of the class action will make it unmanageable, as was the case in *In re Hotel Telephone Charges*, what is usually of greater significance is the complexity of the individual issues that will arise out of the class litigation. For example, in *Morris v. Burchard*,[52] a case involving a class of 1,000 persons, the Court commented as follows:[53]

> In a case such as this [securities case], the issue of reliance could involve a separate trial or proceeding for each member of the class, or nearly 1,000 separate trials, even assuming that somehow a means for a common trial can be developed through which the issue of liability could be efficiently resolved. Whether these trials would individually require a jury resolution under the requirements of the Seventh Amendment is a serious problem.

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[49] *Ibid.*, sec. 2.

[50] 43 F.R.D. 452 (E.D. Pa. 1968), at 459.

[51] *Supra*, note 47, at 91.

[52] *Supra*, note 47.

[53] *Ibid.*, at 535. Compare the result in *Naken v. General Motors of Canada Ltd.* (1978), 21 O.R. (2d) 780, 92 D.L.R. (3d) 100 (C.A.).

At the other extreme may be found class actions in which the size of the class will be almost totally irrelevant. Where the relief sought is injunctive, for example, all the elements of the cause of action may be common questions, with the result that administrative problems are not likely to arise. The same would be true of a class action in which the court could treat the assessment of monetary relief as a common question, or where individual assessment and distribution could be carried out with the aid of a computer, relying on the defendant's records and its personnel, with a minimum of judicial supervision and involvement.[54]

In short, it would seem that American courts have taken a flexible approach to the management problems that a large class may pose. Their decisions would appear to be guided by the realities of each case, and the problems raised thereby.[55]

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[54] See, for example, *Roper v. Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978), and *Partain v. First National Bank of Montgomery, supra*, note 45. In *Roper*, the Court, at 1115, commented as follows on the manageability issue:

> The case presents no unusual difficulties in class management. While the class is large, it is peculiarly manageable. All the members live in one state, the defendant has each member's address on a computer; both that address and the itemized history of each account can readily be obtained.
>
> After substantive rulings are made on the basic issues of liability and damage computation, the case is so manageable that a computer, either in the bank itself or leased elsewhere, can handle its *administration* – as distinguished from the ultimate computation which may in some instances require clerical personnel.

See, also, *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), at 67-69, where the Court expressly drew a distinction between cases in which a formula can be used to calculate damages, and those in which each class member's damages must be assessed in separate proceedings after the resolution of the common questions.

[55] See *United Egg Producers v. Bauer International Corp.*, 312 F. Supp. 319 (S.D.N.Y. 1970) (class of all consumers of eggs in the U.S. not certified); *In re Hotel Telephone Charges, supra*, note 47 (class of 40 million hotel patrons not certified); *Boshes v. General Motors Corporation*, 59 F.R.D. 589 (N.D. Ill. 1973) (class of 30 to 40 million automobile purchasers not certified); *City of Philadelphia v. American Oil Company*, 53 F.R.D. 45 (D.N.J. 1971) (class of more than 6 million not certified); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (class of 6,000,000 held unmanageable); *In re Antibiotic Antitrust Actions, supra*, note 44 (class actions covering 7 states certified; class in California alone estimated to be 4,851,000 households); *Stern v. Massachussetts Indemnity and Life Insurance Company*, 365 F. Supp. 433 (E.D. Pa. 1973) (certification refused for class that potentially had "millions" of members); *Appleton Electric Company v. Advance-United Expressways*, 494 F.2d 126 (7th Cir. 1974) (certification of class action involving "perhaps several million shippers" as plaintiffs and "perhaps 1,400 motor carriers" as defendants upheld on appeal); *O'Meara v. United States*, 59 F.R.D. 560 (N.D. Ill. 1973) (class of "hundreds of thousands, or millions of other possible claimants" certified); *Hackett v. General Host Corporation, supra*, note 45 (court refused to review lower court determination that class of 1.5 million bread purchasers unmanageable); *Cotchett v. Avis Rent A Car System, Inc., supra*, note 45 (class of 500,000 to 1,500,000 held unmanageable); *Link v. Mercedes-Benz of North America, Inc.*, 550 F.2d 860 (3d Cir. 1977) (court refused to review lower court certification of class of 300,000); *Roper v. Consurve, Inc., supra*, note 54 (90,000 person class held manageable); *In re Memorex Security Cases*, 61 F.R.D. 88 (N.D. Cal. 1973) (60,000 person class certified); *Gerlach v. Allstate Insurance Company*, 338 F. Supp. 642 (S.D. Fl. 1972) (50,000 person policyholder class held unmanageable); *Friedlander v. City of New York*, 71 F.R.D. 546

c. Notice Problems

Problems with respect to notice, including the cost of notice and the related matter of class member identification,[56] frequently have been held to affect the manageability of class actions. The Court of Appeals for the Second Circuit in *Eisen v. Carlisle & Jacquelin*,[57] a class action brought on behalf of some six million individuals, drew the following connection between notice and manageability:[58]

> As soon as the evidence on the remand disclosed the true extent of the membership of the class and the fact that Eisen would not pay for individual notice to the members of the class who could be identified, and the evidence further disclosed that the class membership was of such diversity and was so dispersed that no notice by publication could be devised by the ingenuity of man that could reasonably be expected to notify more than a relatively small proportion of the class, a ruling should have been made forthwith dismissing the case as a class action. This dismissal could have saved several years of hard work by the judge and the lawyers and wholly unnecessary expense running into large figures.

On the other hand, problems in the identification of class members resulting from the wilful failure of the defendant to keep records, or from the defendant's intentional destruction of them, where the possibility of litigation was clearly in the contemplation of the defendant, have been rejected as grounds for a finding of unmanageability.[59]

d. Lack of Benefit to Class Members

As was mentioned above, one of the factors that the courts have considered as coming under the manageability rubric is the benefit, or lack thereof, to class members from the prosecution of the class action. Many

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(S.D.N.Y. 1976) (30,000 person class manageable); *Windham v. American Brands, Inc., supra*, note 54 (class of 20,000 held unmanageable); *Partain v. First National Bank of Montgomery, supra*, note 45 (class of 20,000 certified); *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969) (class of "at least 16,000 stockholders of record" certified); *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443 (M.D. Ga. 1976) (6,500 person class held unmanageable); *Schaffner v. Chemical Bank, supra*, note 11 (certification of 5,000 person class refused); *Morris v. Burchard, supra*, note 47 (certification of 1,000 person class refused); and *In re Transit Company Tire Antitrust Litigation, supra*, note 47 (750 person class held unmanageable).

[56] See Moore, *supra*, note 17, Vol. 3B, ¶23.45[4.-4], at 23-370; Wright and Miller, *supra*, note 10, Vol. 7A, §1780, at 75; Note, "Developments in the Law – Class Actions" (1976), 89 Harv. L. Rev. 1318, at 1402 (hereinafter referred to as "Harvard Developments"). See, also, *Gerlach v. Allstate Insurance Co., supra*, note 55; *Philadelphia Electric Co. v. Anaconda American Brass Co., supra*, note 50; *Partain v. First National Bank of Montgomery, supra*, note 45; *United Egg Producers v. Bauer International Corp., supra*, note 55; and *Considine v. Park National Bank*, 64 F.R.D. 646 (E.D. Tenn. 1974).

[57] 479 F.2d 1005 (2d Cir. 1973).

[58] *Ibid.*, at 1016-17.

[59] See *Appleton Electric Company v. Advance-United Expressways, supra*, note 55, at 135.

courts,[60] as well as commentators,[61] have concluded that the absence of any real benefit to the class members from a resolution of the action in their favour should be a factor in finding that the class action is unmanageable. The courts have come to such a conclusion in three different situations: where the costs of administering the suit, including notice costs and lawyers' fees, are likely to deplete any funds recovered in the action;[62] where the claims of the class members are nonviable;[63] and where evidentiary problems are likely to prevent recovery by the individual class members from the fund created by the class litigation.[64]

It should be clear from the preceding discussion that the courts in the United States have been concerned primarily with the presence or absence of monetary benefit from class litigation. This approach, however, has not gone unchallenged by the commentators. For example, it has been argued that the deterrent effect of class litigation should be considered a benefit to members of the class:[65]

> Class actions may confer multiple benefits. Even if administrative costs were to absorb all except an insignificant portion of a class damage recovery, for example, the class action might still benefit class members inasmuch as the class opponent would be forced to disgorge ill-gotten gains, thus setting an example to deter future violations of statutory directives. To determine if a class action is manageable, therefore, a court must identify the benefits which might conceivably accrue from its litigation. . . . The range of benefits a class action may be said

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[60] See *Eisen v. Carlisle & Jacquelin, supra*, note 57; *In re Hotel Telephone Charges, supra*, note 47; *In re Antibiotic Antitrust Actions, supra*, note 44; *Cotchett v. Avis Rent A Car System, Inc., supra*, note 45; *In re Memorex Security Cases, supra*, note 55; *Partain v. First National Bank of Montgomery, supra*, note 45; *Turoff v. Union Oil Company of California*, 61 F.R.D. 51 (N.D. Ohio 1973); and *Trecker v. Manning Implement, Inc.*, 73 F.R.D. 554 (N.D. Iowa 1976).

[61] See, for example, Wright and Miller, *supra*, note 10, Vol. 7A, §1779, at 59; Moore, *supra*, note 17, Vol. 3B, ¶23.45[3], at 23-338; and Harvard Developments, *supra*, note 56, at 1500-02.

[62] See, for example, *In re Hotel Telephone Charges, supra*, note 47, at 91:

> In light of the fact that the proposed class action is likely to consume decades of judicial time, the potential benefit to the class should be carefully weighed against the burden the actions would place upon the federal courts. The average individual recovery in this case is estimated to be only two dollars. Even trebled, the amount of recovery would be entirely consumed by the costs of notice alone.

[63] This problem was alluded to by the Court in *Eisen v. Carlisle & Jacquelin, supra*, note 57. For the meaning of the term "nonviable", see Harvard Developments, *supra*, note 56, at 1356.

[64] See *City of Philadelphia v. American Oil Company, supra*, note 55, at 73, where the Court remarked as follows:

> Simply stated, this Court is not satisfied that the motorist who purchased from a retail service station between 1955 and 1965 within the states of Delaware, New Jersey and Pennsylvania has available to him the type of records necessary to make any meaningful distribution of damage awards if liability and general damages are established. As a consequence, the Court concludes that this portion of the Philadelphia-New Jersey class is unmanageable, and hence, should not be certified.

[65] See Harvard Developments, *supra*, note 56, at 1502.

> to confer must be seen to depend upon the content of the policies reflected in the cause of action to which the class action gives force.

This argument, to date, has not received judicial sanction.[66]

e. Innovative Management Techniques and Conditional Certification

Courts and commentators have not been blind to the negative impact that a refusal to certify a class action on grounds of administrative problems may have upon the ability of class members to obtain relief for their injuries. Indeed, it has frequently been suggested that courts have an affirmative duty to develop innovative management techniques that may serve to overcome such problems so that the claims of class members can be enforced.[67]

Despite a substantial body of case law to this effect,[68] it has been suggested that some courts still have used the manageability determination as "an escape hatch, to avoid complex litigation"[69] where a class action appears complex and difficult. Understandably, there is no case law that can be clearly identified as supporting this proposition, since it is unlikely that a court would expressly admit that it had engaged in such a course of action.

Most efforts of commentators and courts to develop innovative techniques designed to render class actions manageable have involved efforts to deal with the matters of notice and the assessment and distribution of damages.[70] Alternatives to costly individual notice have been suggested.[71] There also have been efforts to develop means of treating damage issues as common questions and of reducing the costs to class members of distributing any resulting damages. Where individual distribution is not feasible, attempts have been made to develop alternatives, which may at least serve goals of behavior modification where compensation is impossible.[72] To the extent that

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[66] It was rejected, for example, by the Court in *In re Hotel Telephone Charges*, *supra*, note 47, at 92.

[67] See Wright and Miller, *supra*, note 10, Vol. 7A, §1780, at 76; Kaplan, "A Prefatory Note" (1969), 10 B.C. Ind. and Com. L. Rev. 497, at 499-500; Federal Judicial Center, Board of Editors, *Manual for Complex Litigation* (1978) (Clark Boardman), §1.43, at 63; and Harvard Developments, *supra*, note 56, at 1502-04. See, also, *In re Antibiotic Antitrust Actions*, *supra*, note 44, at 289; *In re Memorex Security Cases*, *supra*, note 55; *In re Motor Vehicle Air Pollution Control Equipment*, 52 F.R.D. 398 (C.D. Cal. 1970), rev'd on other grounds *sub nom. In re Multidistrict Vehicle Air Pollution MDL No. 31*, 481 F.2d 122 (9th Cir. 1973); *Yaffe v. Powers*, 454 F.2d 1362 (1st Cir. 1972); *Dolgow v. Anderson*, *supra*, note 22; and *Neely v. United States*, 546 F.2d 1059 (3d Cir. 1976).

[68] *Ibid.*

[69] See Newberg, *supra*, note 19, Vol. 1, §1160e, at 274-75.

[70] See Gordon, "Manageability Under the Proposed Uniform Class Actions Act" (1977), 31 Sw. L.J. 715, at 719.

[71] See discussion *infra*, ch. 13.

[72] See discussion *infra*, ch. 14, secs. 3(c)(v) and (vi).

these goals are achieved, they may serve to reduce substantially the number of class actions that are held unmanageable, and therefore increase the scope of defendants' potential liability. It is hardly surprising, therefore, that the proposed solutions to notice and damage manageability problems have been controversial, and the exchanges in the case law and literature concerning their merits heated.

One device that American courts have used as a means of buying time to work out manageability problems, or to obtain the information necessary to determine whether they are likely to arise at all in a particular case, is a conditional certification order.[73] Such an approach to the problem of manageability is possible because Rule 23(c)(1), after stating that the initial certification determination must be made as soon as practicable after commencement of the class action, specifies that "[a]n order under this subdivision may be conditional, and may be altered or amended before the decision on the merits".

The benefits that may flow in the area of management problems from a conditional certification order are well described in the following passage from *In re Sugar Industry Antitrust Litigation*:[74]

> Three reasons exist for granting class action certification when only speculative manageability difficulties are perceived. First, the nature of our judicial system mandates that our courts provide a forum for the redress of injuries, and they should not shirk this responsibility because of conjecture. Secondly, at the outset of litigation, consideration of future manageability is by necessity limited because discovery has not advanced to the point where certain judgments can be made regarding the relative ease or difficulty with which the litigation will progress. Lastly, Rule 23(c)(1), which requires a court to determine the propriety of a class action as soon as practicable after institution of the lawsuit, also allows the courts the luxury of later altering or amending the class certified before any decision on the merits is rendered. It must be remembered that a determination granting a class action always may be modified upon fuller development of the facts, but a negative determination may sound the death knell of the action as one for a class of persons or entities.

A less sympathetic attitude to the use of conditional certification orders was displayed by the Court in *In re Hotel Telephone Charges*.[75] The Court commented as follows on the notion of conditional certification:[76]

> The District Court in this case has relied on the 'imagination' of appellees' counsel to provide solutions that will, at some point in the future, prevent these

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[73] Conditional certification was approved in the following cases: *In re Antibiotic Antitrust Actions, supra*, note 44; *Brennan v. Midwestern United Life Insurance Co., supra*, note 42; *In re Sugar Industry Antitrust Litigation, supra*, note 43; *Link v. Mercedes-Benz of North America, Inc., supra*, note 55; and *Neely v. United States, supra*, note 67. Compare *Eisen v. Carlisle & Jacquelin, supra*, note 57; *In re Hotel Telephone Charges, supra*, note 47; and *In re Transit Company Tire Antitrust Litigation, supra*, note 47.

[74] *Supra*, note 43, at 356.

[75] *Supra*, note 47.

[76] *Ibid.*, at 90.

> individual issues from splintering the action into thousands of individual trials requiring years to litigate. Thus far the appellees have not been able to demonstrate to our satisfaction that the individual questions will not overwhelm the common questions, unless some of the required elements or allowed defenses in respect of the alleged claims are eliminated or impaired. The issues raised by the apparent existence of numerous individual questions must be resolved before a class is certified, even if certification is conditional.

An intermediate, but still essentially unsympathetic, stance that may serve to reconcile partially the *Sugar Litigation* and *Hotel Telephone* positions was taken by the Court in *Windham v. American Brands, Inc.*,[77] which stated as follows:[78]

> Plaintiffs . . . [declare] that they 'expect' to develop a formula, which will simplify the computation of individual damages, at some later point in the litigation. Concededly, a district court should not decline to certify a class because it fears that insurmountable problems may later appear. But where the court finds, on the basis of substantial evidence as here, that there are serious problems *now appearing*, it should not certify the class merely on the assurance of counsel that some solution will be found.

The Commission's recommendation concerning conditional certification will be described in chapter 10 of this Report.[79]

(v) Other Factors Relevant to the Superiority Requirement

A number of other factors that are not listed in Rule 23, but that seem to be pertinent to the resolution of the superiority question, will be considered briefly in this section. These are the impact of class litigation upon the defendant in the case, the possible adverse effects of a class action on the class members, the judicial economies to be achieved by the action proceeding in class form, the increased access to justice that flows from a class action, and the impact of a class action on the relevant substantive law. We begin our discussion by adverting to the "access" benefit of class actions.

a. Access to Justice

The potential of class actions to provide a remedy for claimants who are illiterate, unsophisticated, or otherwise incapable of enforcing their rights has been recognized as relevant to the issue of superiority by some courts. For example, the Court in *Haynes v. Logan Furniture Mart, Inc.*,[80] in considering the superiority of the class action before it, referred to "the inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individual-

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[77] *Supra*, note 54.

[78] *Ibid.*, at 70 (emphasis in original).

[79] See *infra*, ch. 10, sec. 4(d).

[80] 503 F.2d 1161 (7th Cir. 1974). See, also, Newberg, *supra*, note 19, Vol. 1, §1160, at 283.

ly".[81] Even where the class members are knowledgeable and, at least in theory, have the economic wherewithal to litigate, a class action may be the only practical means of ensuring access to justice where the claims are too small relative to the cost of asserting them to justify individual litigation.[82]

b. Judicial Economy

As we have pointed out earlier in this Report,[83] one of the major arguments in support of litigation in class form is the judicial economy that can be achieved by proceeding in this way; this argument is particularly apposite where the claims are individually recoverable, and are likely to be prosecuted in any event. It is not surprising, therefore, that American courts have consistently recognized this attribute of class actions when dealing with the issue of superiority.[84]

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[81] *Ibid.*, at 1165.

[82] See, for example, *In re Ampicillin Antitrust Litigation, supra*, note 43; *Berland v. Mack, supra*, note 55; *Dolgow v. Anderson, supra*, note 22; *Partain v. First National Bank of Montgomery, supra*, note 45; *State of Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969); *State of Minnesota v. United States Steel Corporation*, 44 F.R.D. 559 (D. Minn. 1968); *duPont Glore Forgan, Inc. v. American Telephone and Telegraph Co.*, 69 F.R.D. 481 (S.D.N.Y. 1975); *Contract Buyers League v. F. & F. Investment*, 48 F.R.D. 7 (N.D. Ill. 1969); *Vernon J. Rockler and Co. v. Graphic Enterprises, Inc., supra*, note 22; *Alameda Oil Co. v. Ideal Basic Industries, Inc., supra*, note 27; and *Eisen v. Carlisle & Jacquelin, supra*, note 57.

In the *Graphic Enterprises, Inc.* case, the Court observed as follows, at 347:

> [M]any of the claims of individual class members may be too small to justify on an individual basis, the investigative and litigation expense involved in prosecuting the suit . . . .
>
> The general view of courts and commentators is that the class action device is a necessary vehicle for the vindication of small claims.

[83] See *supra*, ch. 4, sec. 3(a)(i).

[84] See Newberg, *supra*, note 19, Vol. 1, §1160, at 281, and Vol. 4, §7526g, at 56. See, also, *State of Illinois v. Harper & Row Publishers, Inc., supra*, note 82; *In re Ampicillin Antitrust Litigation, supra*, note 43; and *In re Plywood Anti-trust Litigation*, 76 F.R.D. 570 (E.D. La. 1976).

One of the early decisions under Rule 23, *Herbst v. Able*, 47 F.R.D. 11 (S.D.N.Y. 1969), at 17, makes this point very clearly:

> [T]he superiority, in terms of judicial economy, of declaring these actions [involving alleged violations of the anti-fraud provisions of the United States securities legislation] to be class actions becomes apparent. The economy consideration here will affect not only the time of judges and court personnel, but also the time of parties, particularly defendants.

Compare the observations of the Court in *In re Transit Company Tire Antitrust Litigation, supra*, note 47, at 79:

> Although it may be said the interests of judicial economy are better served if all similar litigation is concentrated in one forum and that therefore the tremendous administrative burden and management problems which would be created by the proof of damages in this litigation should not dictate against maintenance of a class action, it is a fact of life that at some point the administrative burden and management problems overwhelm the Court which may have taken on class action litigation without adequate consideration of those factors. General statements regarding 'judicial economy' without regard to the limits of the particular court upon which the burden of this 'economy' is placed are meaningless.

c. Fairness to the Defendant

There are a number of decisions regarding the superiority requirement of Rule 23(b)(3) in which certification has been refused on the basis that it would be unfair to the defendant in the particular circumstances of the case to subject it to a class action.[85] Much of the discussion in this area has focused upon the likely effect of a large damage award on the economic viability of the defendant. In one case, *Kline v. Coldwell, Banker & Co.*,[86] in which credence was given to this argument, the Court remarked as follows:[87]

> The amount of a recovery in a lawsuit is not ordinarily of concern where a wrong has been inflicted and an injury suffered. But when 2,000 are joined in an action [where damages in the amount of $750 million were claimed] in which each is jointly and severally liable, the liability is increased in geometric progression. Such an award against each of 2,000 real estate broker defendants would shock the conscience.

This analysis, however, has not gone unchallenged, and at least one Court has expressed the opinion that the extent of a defendant's liability should not affect the superiority of the class action procedure. In the case of *Turoff v. Union Oil Company of California*,[88] it was pointed out that, "[i]n many fields . . . the courts enforce recoveries which result in bankruptcy . . .".[89] We too are of the opinion that this type of unfairness should be irrelevant to the superiority determination under the Commission's proposed *Class Actions Act.*

It has been suggested by some that class actions constitute a form of "legalized blackmail" against innocent defendants, and that, as a result, they are inherently unfair. In chapter 4 of this Report, we discussed in some detail this particular accusation, which has been levelled frequently against class actions. We concluded that the "legalized blackmail" characterization of class actions does not appear to be justified. Nonetheless, in part to meet the concern of those who hold this view, we recommended in chapter 7 that a preliminary merits test should be made part of the certification process proposed by the Commission. As a result, we believe that any unmeritorious cases that could give rise to "legalized blackmail" will be screened out at an early stage in class proceedings brought pursuant to the proposed *Class Actions Act.*

d. Adverse Effects on Class Members

In a small number of American class action cases, the court, in determin-

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[85] See, for example, *Hoffman v. Charnita, Inc.*, 58 F.R.D. 86 (M.D. Pa. 1973), at 92; *Kamm v. California City Development Co.*, 509 F.2d 205 (9th Cir. 1975); and *Katz v. Carte Blanche Corporation*, 496 F.2d 747 (3d Cir. 1974).

[86] *Supra*, note 47.

[87] *Ibid.*, at 234. See, also, *Ratner v. Chemical Bank New York Trust Company*, 54 F.R.D. 412 (S.D.N.Y. 1972), at 416.

[88] *Supra*, note 60.

[89] *Ibid.*, at 54. See, also, Newberg, *supra*, note 19, Vol. 1, §1160n, at 286, and *Eisen v. Carlisle & Jacquelin, supra*, note 57, at 1019.

ing the superiority of the class action before it, has made reference to the adverse financial or other effects of the action on individual class members. In one case,[90] for example, the Court referred to the fact that the class action brought on behalf of the policyholders of an insurance company would render the defendant "unable to meet its commitments to provide insurance coverage to its policyholders . . . and as a consequence plaintiff's position is adverse to those policyholders who would prefer insurance coverage to the $100 penalty and risk of loss of coverage".[91]

In addition, at least one court has taken into account, as a factor relevant to superiority, the inconvenience to class members and to prospective witnesses of the action being brought in class form.[92] The importance of this particular factor should not be overstated, however; in chapters 11 and 14, we shall make a number of recommendations designed to minimize any inconvenience that might result from proceedings taking the form of a class action.[93]

e. Interaction of Class Actions with Substantive Law

Another factor to which courts in the United States have had regard in determining the issue of superiority under Rule 23 is the possible impact of class actions on the particular substantive law area in question. The importance of this "substantive analysis" is apparent from the following remarks:[94]

> The surest way to guarantee the consistency of class action procedures and substantive policies is to ground the justification for the procedures in the policies themselves. On this view, the increased access to courts that class actions make possible is justified because it allows the policies underlying the claims enforced in a class suit to be given effect in situations in which this would not otherwise be the case.

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[90] *Gerlach v. Allstate Insurance Company, supra*, note 55.

[91] *Ibid.*, at 646. See, also, *Schaffner v. Chemical Bank, supra*, note 11, at 335.

[92] See *In re Transit Company Tire Antitrust Litigation, supra*, note 47, at 75:

> [E]ven if it could be said to a reasonable certainty that [separation of the calculation of the amount of damages from all other issues which could be tried in common was possible], this Court questions the interests of judicial economy and the superiority of a class action which requires all of the class members to enter an appearance and establish the amount of their monetary damage in a court which may be thousands of miles from their place of business. When the benefits of a class determination of violation and possible injury are weighed against the expenses which the class members must incur by litigation in a distant forum, the inconvenience to the parties and witnesses, the administrative problems involved, and the problems of notice to the class members, the resulting balance reveals that the class action device offers no superiority over the individual litigation of claims.

[93] For example, in chapter 11, we shall recommend that the court presiding over a class action should have broad powers to ensure that the proceedings are conducted efficiently and expeditiously: see sec. 3(b). In chapter 14, we shall make a number of recommendations regarding the distribution of any damages recovered by a class to the individual members of the class.

[94] See Harvard Developments, *supra*, note 56, at 1359-60.

> If class actions are to be substantively justified in this way, the key question becomes whether the policies underlying a cause of action are indeed furthered by class suit . . . . Judicial analysis must concern itself chiefly with the policies which may be seen to underlie a given cause of action.

While there does not appear to be much dispute about the propriety of such an analysis, the difficulties inherent in a substantive analysis are evidenced by the fact that courts have come to different conclusions in cases arising out of the same substantive law area.

Perhaps the best known example of a judicial decision of this kind may be found in *Ratner v. Chemical Bank New York Trust Company*,[95] a class action on behalf of 130,000 persons brought under the American Truth in Lending Act, which provided for a statutory minimum damages recovery of $100.[96] In that case, the judge observed:[97]

> Students of [Rule 23] have been led generally to recognize that its broad and open-ended terms call for the exercise of some considerable discretion of a pragmatic nature. Appealing to that kind of judgment, defendant points out that (1) the incentive of class-action benefits is unnecessary in view of the Act's provisions for a $100 minimum recovery and payment of costs and a reasonable fee for counsel; and (2) the proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act. These points are cogent and persuasive. They are summarized compendiously in the overall conclusion stated earlier: the allowance of this as a class action is essentially inconsistent with the specific remedy supplied by Congress and employed by plaintiff in this case. It is not fairly possible in the circumstances of this case to find the (b)(3) form of class action 'superior to' this specifically 'available [method] for the fair and efficient adjudication of the controversy.'

Arriving at a contrary conclusion on the propriety of class actions in Truth in Lending cases, the Court in *Haynes v. Logan Furniture Mart, Inc.* observed as follows:[98]

> First, as a matter of legislative intent, it is not at all clear that Congress meant to bar the use of class actions in cases brought under the Act. Nothing in the legislative history of the Act or the Act itself expressly or impliedly prohibits the use of the class action. . . . Class actions have been extensively used in antitrust and securities litigation without specific legislative authorization, and Congress was certainly cognizant of the fact that class actions were a part of the existing body of law when the Truth in Lending statute was enacted.

In the end, Congress resolved the dispute among the various courts on this point by taking an intermediate position. The legislators expressly recognized the possibility of class litigation under the Act, but declared that

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[95] *Supra*, note 87.

[96] Pub. L. No. 90-321, Title 1, §130(a), 82 Stat. 146. See, now, 15 U.S.C. §1640(a). For a discussion of this legislation, see *supra*, ch. 5, sec. 3(d)(i).

[97] *Supra*, note 87, at 416.

[98] 503 F.2d 1161 (7th Cir. 1974), at 1164.

the $100 minimum recovery provision did not apply in class suits, and limited the amount of the recovery in class actions to "the lesser of $500,000 or 1 per centum of the net worth of the creditor".[99]

The Court in *Kline v. Coldwell, Banker & Co.*[100] expressed a different kind of concern about the interaction between class actions and the substantive law. The case was brought on behalf of all sellers of real estate in Los Angeles County, and involved an allegation that a class of real estate brokers had conspired in violation of the antitrust laws to fix brokerage commissions. The Court was concerned about the possible impact of the normal rules of joint and several liability upon the individual members of the defendant class in this situation:[101]

> The allegation is that from the 400,000 to 800,000 transactions during the period in question damages will be proved in excess of $250 million which trebled will aggregate $750 million. In addition, plaintiffs are asking for costs and attorneys' fees. All of these elements of recovery are within the provision of 15 U.S.C. §15. The amounts are staggering. In addition, the prayer is for recovery against the defendants jointly and severally . . . . This means that the small individual operator faces a potential liability of upwards of three-quarters of a billion dollars for which all of his or her assets are responsible.

Again, however, this position was challenged in a subsequent decision. After noting the reasoning in the *Kline* case, the judge in *Chevalier v. Baird Savings Ass'n*[102] observed:[103]

> [W]hether this suit proceeds as a class action or not, the law places joint and several liability upon the defendants for all injuries caused by any conspiracy of which they were members. The class action device merely provides a procedure for adjudicating the respective rights of the parties. If defendants' liability shocks the conscience, it is the fault of the substantive law which places joint and several liability on co-conspirators, not the class action.

The complexity of the issues to be resolved in a substantive superiority analysis of the propriety of class actions is indicated by the disagreements of the various courts set out above. At the same time, it seems clearly desirable that an appropriate integration between class actions and a particular cause of action should be considered as part of the superiority determination.

Having completed our examination of the case law relevant to the superiority determination under Rule 23 of the United States Federal Rules of Civil Procedure, we turn our attention to the "superiority" provisions found in other class action legislation and proposed legislation. We begin with a brief discussion of the Illinois class action provision.

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[99] See 15 U.S.C. §1640(a)(2)(B).

[100] *Supra*, note 47.

[101] *Ibid.*, at 234-35.

[102] 72 F.R.D. 140 (E.D. Pa. 1976).

[103] *Ibid.*, at 150.

(b) Illinois Civil Practice Act

In 1977, a new class action provision was enacted in the State of Illinois. Interestingly, section 57.2 of the Illinois Civil Practice Act[104] does not refer to any particular criteria pertinent to its equivalent of the superiority provision contained in Rule 23. Instead, section 57.2(4) simply provides as follows:[105]

> 57.2 An action may be maintained as a class action in any court of this state and a party may sue or be sued as a representative party of the class only if the court finds:
>
> . . . .
>
> (4) The class action is an *appropriate* method for the fair and efficient adjudication of the controversy.

It is important to note, in addition to the absence of any pertinent criteria, that section 57.2(4) speaks in terms of the "appropriateness" of a class action in the circumstances of the case, rather than of the superiority of class proceedings, as is the case under Rule 23(b)(3). This would appear to be a considerably less exacting test than that imposed by the superiority provision of Rule 23.

(c) New York Civil Practice Law and Rules

New York, too, has recently introduced new class action legislation.[106] The matters that a class representative must establish in order to bring an action in class form are set out in section 901 of the New York Civil Practice Law and Rules. Among the prerequisites specified is a requirement that the representative plaintiff establish the superiority of the class action "to other available methods for the fair and efficient adjudication of the controversy". Unlike Rule 23(b)(3), however, the superiority provision of the New York Civil Practice Law and Rules does not contain a list of factors relevant only to the issue of superiority. Rather, section 902 contains a list of factors that are relevant to all the prerequisites set out in section 901. The factors listed are the following:

> 1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
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> 2. The impracticability or inefficiency of prosecuting or defending separate actions;
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> 3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
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> 4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;
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> 5. The difficulties likely to be encountered in the management of a class action.

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[104] Ill. Ann. Stat. ch. 110, §57.2-57.7 (Smith-Hurd 1981 Supp.).

[105] Emphasis added.

[106] See N.Y. Civ. Prac. Law §§901-909 (McKinney).

It should be pointed out that, with the exception of the second factor, these matters are all relevant to the determination of superiority and predominance under Rule 23(b)(3). As indicated, under the New York legislation, a court would be able to consider their effect not only in determining the issues of superiority and predominance, but also with respect to adequacy of representation, numerosity, common questions, and typicality. The Practice Commentaries to section 902 make it clear that the five factors set out above are to be regarded as illustrative and not exhaustive.[107]

(d) Uniform Class Actions Act

Like the class action legislation examined up to this point, the American Uniform Class Actions Act[108] contains a "superiority" provision. Section 2(b)(2) states that a court may certify an action as a class action if it finds that "a class action should be permitted for the fair and efficient adjudication of the controversy". Section 3(a) of the Act lists thirteen factors that a court must consider "[i]n determining whether the class action should be permitted for the fair and efficient adjudication of the controversy". In addition to the thirteen factors specifically mentioned in section 3(a), the court is directed to consider any other relevant factors.

The matters referred to in Rule 23(b)(3)(A) to (D) and those enumerated in section 902 of the New York Civil Practice Law and Rules are all to be found in section 3(a) of the Uniform Class Actions Act. The Act also specifies a number of other relevant factors, among which are the following: "whether common questions of law or fact predominate over any questions affecting only individual members";[109] "whether other means of adjudicating the claims . . . are impracticable or inefficient";[110] "whether a class action offers the most appropriate means of adjudicating the claims";[111] and "whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class".[112]

We wish to comment briefly on sections 2(b)(2) and 3(a) of the Uniform Class Actions Act. First, unlike Rule 23, which requires the court to find a class action commenced under subdivision (b)(3) of the Rule to be a superior device for the prosecution of the claims of the members of the class, the determination under section 3(a) of the Uniform Class Actions Act, "whether a class action offers the most appropriate means of adjudicating the claims",

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[107] See McKinney's Consolidated Laws of New York, Vol. 7B, Practice Commentaries, at 337.

[108] National Conference of Commissioners on Uniform State Laws, Uniform Class Actions Act, Uniform Laws Ann. (1975), Vol. 12 (Cum. Supp. 1981), at 20 *et seq.* (hereinafter referred to as "U.C.A.A.").

[109] *Ibid.*, §3(a)(5).

[110] *Ibid.*, §3(a)(6).

[111] *Ibid.*, §3(a)(7).

[112] *Ibid.*, §3(a)(13).

is only one of many factors relevant to the "fair and efficient adjudication" finding required by section 2(b)(2). On this basis, it may be contended that the "superiority" test introduced by the Uniform Class Actions Act imposes a lesser standard than even the Illinois Civil Practice Act, section 57.2(a)(4) of which obligates a court to find only that a "class action is an appropriate method for the fair and efficient adjudication of the controversy".

Secondly, the predominance of common questions over any questions affecting only individual members is but one of thirteen factors that a court determining the issue of certification is specifically required to consider under section 3(a) of the Uniform Class Actions Act. This is in contrast to Rule 23, where a common questions predominance requirement is imposed only on Rule 23(b)(3) class actions.

A third feature of the "superiority" provision of the Uniform Class Actions Act worth noting is the specific reference in section 3(a)(6) to "whether other means of adjudicating the claims . . . are impracticable or inefficient". The significance of this sort of provision is that it would seem to encourage a court to enter into a comparative analysis of various procedures in determining whether a class action is superior or appropriate. It will be recalled that some courts in the United States have failed to undertake such an analysis under the superiority provision of Rule 23.

Finally, we wish to comment on section 3(a)(13) of the Uniform Class Actions Act. Under this provision, it will be remembered, the court must consider "[w]hether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class". In other words, the court is expressly directed by section 3(a)(13) to undertake a cost-benefit analysis of the putative class action. The provision makes express what the courts are doing under the Rule 23 superiority provision.

Having described the "superiority" provision to be found in some of the American class action legislation, we turn to consider the manner in which this question has been addressed in class action legislation and proposals in Canada and Australia. We begin with the class action provisions recently enacted in Quebec.

(e) Quebec Class Action Legislation

As we have pointed out on a number of occasions, the most progressive class action legislation in Canada, if not in the Commonwealth, at the present time is to be found in Quebec. Although the class action provisions of the *Code of Civil Procedure*[113] are influenced by Rule 23 of the United States Federal Rules of Civil Procedure, no superiority test, as such, is imposed by the *Code* on class litigation. The only provision that remotely resembles the superiority requirement imposed by Rule 23(b)(3) is article 1003(*c*), which provides as follows:

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[113] R.S.Q. 1977, c. C-25, arts. 999-1051, as enacted by S.Q. 1978, c. 8, s. 3 (hereinafter referred to as "C.C.P.").

> 1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
>
> . . . .
>
> (*c*) the composition of the group makes the application of article 59 or 67 difficult or impracticable; . . .

Article 59 has to do with the right of one person to appear in judicial proceedings on behalf of others, "if he holds their mandate".[114] This procedure should not be confused with joinder, which is dealt with separately in article 67 of the Quebec *Code of Civil Procedure.* In summary, then, a Quebec court may certify a class action only if it is satisfied that the representative procedure delineated by article 59, or joinder, is difficult or impracticable.

(f) Williams' Model Consumer Class Actions Act

The Model Consumer Class Actions Act suggested by Professor Williams[115] contains a very straightforward superiority test. Section 3(3)(*b*) of this Act states as follows:

> 3.-(3) The court shall order that the action is to be maintained as a class action if the conditions set out in section 2 are satisfied and the court finds that: –
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> . . . .
>
> (*b*) a class action is superior to other available methods for the fair and efficient adjudication of the controversy; . . .

The language of section 3(3)(*b*) is identical to that employed in Rule 23(b)(3); Williams' Model Act, however, contains no criteria relevant to the superiority determination.

(g) Bill C-13 and Bill C-42

In 1977, two successive Bills[116] were introduced in the House of Commons to amend the federal *Combines Investigation Act.*[117] Neither Bill was passed, but either of the two Bills, if passed, would have resulted in the enactment of a new *Competition Act*, and would have provided for class actions in this particular area of the law. Both Bill C-13 and Bill C-42 would

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[114] For a brief discussion of "mandate", see Castel, *The Civil Law System of the Province of Quebec* (1962), at 134-35.

[115] See Williams, "Model Consumer Class Actions Act", in "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 65 *et seq.* (hereinafter referred to as "Williams' Model Act").

[116] *An Act to Amend the Combines Investigation Act*, Bill C-13, 1977 (30th Parl. 3d Sess.) (hereinafter referred to as "Bill C-13"), and *An Act to Amend the Combines Investigation Act*, Bill C-42, 1977 (30th Parl. 2d Sess.) (hereinafter referred to as "Bill C-42").

[117] R.S.C. 1970, c. C-23, as amended.

have made a finding that "a class action is superior to any other available method for the fair and efficient adjudication of the issues to be determined between the members of the class and the person or persons against whom the proceedings were commenced",[118] a prerequisite to court approval of a class action. Section 39.12(3) of both Bills would have required the court, in determining the superiority issue, to consider the following:

> (*a*) whether the questions of law or fact that appear to be common to the causes of action of the members of the class predominate over any questions affecting only individual members; and
>
> (*b*) where appropriate, whether there are a sufficient number of members of the class who are likely to have suffered a significant quantum of loss or damage to warrant the cost of administering the relief claimed in the proceedings.

Of particular interest for present purposes is the fact that paragraph (*a*), above, makes the predominance of common questions over individual issues a factor relevant to superiority: proof of predominance, in other words, is not raised to the level of a threshold test in the proposed *Competition Act*, as it is now in Rule 23.[119]

Section 39.12(3)(*b*), like section 3(a)(13) of the American Uniform Class Actions Act,[120] would appear to be an express cost-benefit provision. In determining the superiority issue, a court would have had to balance the cost of administering a given class action against the likely recovery to be secured thereby. Again, section 39.12(3)(*b*) would have authorized explicitly what courts in the United States have done under Rule 23(b)(3).

(h) South Australia Draft Bill for a Class Actions Act

The Draft Bill for a Class Actions Act appended to the *Thirty-sixth Report Relating to Class Actions*[121] of the Law Reform Committee of South Australia contains a superiority provision similar in structure, but not in language, to that found in Bill C-13 and Bill C-42, discussed in the preceding section. Section 3(3) and (4) provides as follows:

> 3.-(3) The Court shall order that the action is to be maintained as a class action if the conditions set out in section 2 are satisfied and if in the opinion of the Court –
>
> . . . .
>
> (*b*) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

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[118] Bill C-42, *supra*, note 116, s. 39.12(2)(*e*), and Bill C-13, *supra*, note 116, s. 39.12(2)(*e*).

[119] As discussed, this is essentially the position adopted by this Commission with respect to the issue of common questions predominance.

[120] U.C.A.A., *supra*, note 108.

[121] See Law Reform Committee of South Australia, "Draft Bill for a Class Actions Act", in *Thirty-sixth Report Relating to Class Actions* (1977), at 12 *et seq.* (hereinafter referred to as "South Australia Draft Bill").

(4) In determining whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy, the Court shall consider among other matters: –

(*a*) whether common questions of law or fact predominate over any questions affecting individual members; and

(*b*) the difficulties likely to be encountered in administering relief to members of the class by reason of the size of their individual claims and the number of class members.

Section 3(4)(*a*) of the Draft Bill is self-explanatory; it makes the common questions predominance test part of the superiority determination. Insofar as section 3(4)(*b*) is concerned, it is another example of an express cost-benefit component of a superiority test. However, it would appear that this provision is broader in scope than section 39.12(3)(*b*) of Bills C-13 and C-42, discussed above.

3. A TWO-STAGE "SUPERIORITY" TEST

(a) Preliminary Remarks

The Commission favours making a superiority requirement one of the prerequisites to the certification of a class action for three reasons. First, while we strongly believe that certain economies and increased access to justice will result from a more liberal class action procedure, at the same time we are not unmindful of the burdens that complex class action litigation will impose upon the judiciary and the administration of justice. As a result, it is the Commission's view that a class representative should be under an obligation to satisfy the court hearing the certification application that class proceedings are superior to other methods of disposing of the dispute.

A second justification for a superiority requirement is the fact that the Commission has decided to recommend changes to the rules governing costs[122] and the assessment and distribution of monetary relief[123] in the class action context. We believe that the recommendations that we shall propose in these areas are necessary to make the Commission's proposed class action procedure truly effective. However, these innovations in the law of costs and damages should be limited to cases where litigation in class form offers real advantages over other procedural techniques.

Thirdly, as indicated on a number of occasions, class actions are unique in that they permit the determination of the rights of individuals in their absence. While the Commission has made a number of recommendations designed to ensure that the interests of class members are adequately safeguarded,[124] we are of the view that a requirement that class actions be

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[122] See *infra*, ch. 17.

[123] See *infra*, ch. 14.

[124] See, for example, the Commission's recommendations regarding adequacy of representation, discussed *supra*, ch. 8, sec. 4, and the proposals for a common questions requirement, discussed *supra*, ch. 8, sec. 3.

utilized only where they are the superior means of providing relief will provide class members with additional protection.

The argument against including a superiority requirement in the class action procedure proposed by the Commission is a simple one. It may be argued that no such test is imposed on any other procedural technique employed by a plaintiff in civil proceedings in Ontario. Upon closer examination, however, this argument does not seem particularly persuasive; the Supreme Court of Ontario Rules of Practice[125] contain a number of provisions designed to ensure that the most appropriate course of action is employed for the resolution of individual disputes. For example, there are the provisions designed to obviate the need for a multiplicity of actions in many situations. This antipathy to multiple actions, where the matters in dispute can be resolved in one proceeding, is statutorily enshrined in Ontario in section 18.8 of the *Judicature Act*,[126] which provides as follows:

> 18.8. The court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it has power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as it deems just, all such remedies as any of the parties appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them in such cause or matter, so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

The Supreme Court of Ontario Rules of Practice seek to further this objective by permitting a plaintiff to "unite, in the same action, several causes of action".[127] Rule 66 authorizes the joinder in one action of a number of persons as plaintiffs. Under Rule 67, a plaintiff "may join as defendants [in one action] all persons against whom he claims any right to relief". In these and other instances in the law of civil procedure, however, the court is invested with a certain degree of discretion to separate out claims where the action, as constituted, cannot be disposed of conveniently in one action, or where the action, as framed, could result in prejudice to the defendant.[128] This discretion may be viewed as a power in the courts to decide whether the course of action chosen by the plaintiff or plaintiffs is appropriate, or perhaps even superior to other available procedures. We can see no reason why a class action should not be subject to a similar kind of scrutiny or, indeed, more vigorous scrutiny.

Having concluded that there is a need for a superiority provision in the proposed *Class Actions Act*, it remains to be considered what form this requirement should take. The Commission is attracted by the superiority prerequisite contained in Rule 23(b)(3), but we are of the view that it requires some modification.

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[125] Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540.

[126] R.S.O. 1980, c. 223.

[127] *Supra*, note 125, r. 69.

[128] See, for example, the Supreme Court of Ontario Rules of Practice, *supra*, note 125, rr. 66, 67, and 73. For a discussion of this point, see Williston and Rolls, *The Law of Civil Procedure* (1970), Vol. 2, ch. 10.

Perhaps the most unsatisfactory feature of the superiority provision of Rule 23(b)(3), as it has been applied in the United States, is the discrepancy that has developed between the actual language of the Rule and the manner in which it has been interpreted by the courts. On its face, the Rule grants authority to courts to refuse to certify a class action on the ground that it is not superior only where there are "other available methods for the fair and efficient adjudication of the controversy".[129] As has been noted earlier, however, some courts have refused to certify class actions in the name of superiority or manageability where they believe that the disadvantages resulting from the class proceedings outweigh their advantages, even where there is, in fact, no truly available alternative. This refusal to certify means that the class members, practically speaking, will obtain "no relief".

There is much to be said for the proposition that courts should be allowed to refuse certification of class actions that are not in the public interest because the costs of such proceedings outweigh the benefits. Indeed, in light of the American courts' assumption of the right to make such determinations in defiance of what seems to be the clear language of Rule 23, it is questionable whether any statutory language could be drafted that could prevent the making of such determinations in situations where a court is of the view that it is imperative that a particular class action should not be allowed to proceed.

If such a power is to be exercised, however, it would seem preferable that it be authorized and regulated by express statutory language, instead of developing erratically through the case law in a manner at odds with the language of the class action provision. This argument is reinforced by the fact that such a judicial power to refuse the enforcement of a valid cause of action, because of what are, in essence, pure policy considerations, is a major departure from the practice in individual suits, where courts are obliged to hear and dispose of such claims no matter how burdensome they may be for the courts or the public.

We, therefore, recommend that these questions, which American courts have treated as intermingled with the superiority test under Rule 23(b)(3), should be analyzed separately through a two-step process that would be reflected in two distinct sections of the proposed Ontario *Class Actions Act*. The courts would be required first to make a true superiority analysis, comparing class actions with other practicable alternatives in terms of their relevant advantages and disadvantages. If there were a truly available alternative that was as good as or better than a class action, the court would be obliged to refuse certification on that ground alone, and matters would not go any further.

Where, on the other hand, there was no truly available alternative to a class action, or where class proceedings were superior to those that did exist, the court would be given a further power to refuse to certify an action if it was satisfied that the advantages of a class action to the courts, the class, and the public were outweighed by its costs. While theoretically possible, it seems

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[129] Fed. R. Civ. P. 23(b)(3).

unlikely that a court would refuse to certify a class action on these grounds where another practicable, but inferior, means of asserting the claims of class members existed. By definition, such a denial of certification would result in the assertion of separate actions with all their adverse effects. Therefore, denial of certification on "cost-benefit" grounds would usually take place only where no alternative means of obtaining relief exists. We shall return to a discussion of the Commission's proposed cost-benefit provision below.[130] At this juncture, we turn to discuss the superiority component of the Commission's recommended two-step process.

(b) The Superiority Requirement

(i) General

The Commission recommends[131] that, before a court certifies an action as a class action, the court should be required to find that a class action is superior to other available methods for the fair and efficient resolution of the particular controversy. It should be noted that we have decided to require the class representative to establish the "superiority", rather than merely the "appropriateness",[132] of the class proceedings. Given the likely complexity of class actions and the changes that the Commission has fashioned to facilitate the bringing of class actions, we believe that an "appropriateness" test would set too low a standard.

Before turning to consider whether the proposed *Class Actions Act* should list factors relevant to the recommended superiority test, we wish to comment briefly on some of the alternatives that a court should canvass in determining whether a class action is "superior to other available methods for the fair and efficient resolution of the particular controversy".

In chapter 3 of this Report,[133] we examined in some detail the major alternatives to class actions in this jurisdiction, with a view to ascertaining the need, if any, for the reform of the present law governing class actions. We are concerned here not with the theoretical advantages and disadvantages of alternative procedures to a class action under the proposed *Class Actions Act*, but rather with the practicability of resorting to some procedure other than a class action for the determination of the rights of the members of the class in the circumstances of a particular case. Under the superiority provision, it would be necessary for the court to examine the viability of joinder of some or all of the class members under Rule 66 of the Supreme Court of Ontario Rules of Practice.[134] The possibility of a test case also would have to be

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[130] See *infra*, this ch., sec. 3(c).

[131] See Draft Bill, s. 3(3)(*d*).

[132] See § 57.2(4) of the Illinois Civil Practice Act, Ill. Ann. Stat. ch. 110 (Smith-Hurd 1981 Supp.).

[133] See *supra*, ch. 3, sec. 1.

[134] *Supra*, note 125. This alternative is discussed in some detail *supra*, ch. 3, sec. 1(b).

considered by the court.[135] In addition, the possibility and feasibility of each member of the class bringing an individual action should be canvassed, along with the possible application of the doctrine of non-mutual collateral estoppel.[136] Another procedural alternative that a court might wish to examine in determining the issue of superiority is intervention.[137]

We would point out, however, that, while one or more of the abovementioned procedures may well be a practicable alternative to a class action, often this will not be the case. In chapter 3 of this Report, we discussed generally the deficiencies of these procedures as means of redressing mass wrongs. In the circumstances of a particular case, the deficiencies of a particular procedural alternative may well render it more theoretical than real. For example, as discussed in chapter 3, individual litigation may be considered a realistic alternative to class litigation only where the claims of class members are individually recoverable, and where no significant judicial economies can be achieved by proceeding in class form.

One procedural alternative that we believe merits special discussion is the possibility of proceedings before an administrative tribunal to secure relief for the members of the class. There has been some controversy in the United States under Rule 23(b)(3) regarding the propriety of considering the existence of some administrative remedy as an alternative to a class action.[138]

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[135] For a discussion of a test case as an alternative to a class action, see *supra*, ch. 3, sec. 1(c).

[136] For a discussion of this alternative and the doctrine of non-mutual collateral estoppel, see *supra*, ch. 3, sec. 1(a)(ii). See, for example, *In re Anthracite Coal Antitrust Litigation*, 78 F.R.D. 709 (M.D. Pa. 1978), where the Court, in determining the superiority issue, considered the effect of a broad application of the doctrine of non-mutual collateral estoppel.

[137] See discussion *supra*, ch. 3, sec. 1(d).

[138] See *Schaffner v. Chemical Bank, supra*, note 11; *Hoffman v. Charnita, Inc., supra*, note 85. See, also, Wright and Miller, *supra*, note 10, Vol. 7A, §1779, at 64; Moore, *supra*, note 17, Vol. 3B, ¶23.45[4.-3], at 23-368; and Newberg, *supra*, note 19, Vol. 4, §7760.04g, at 612. Compare *Amalgamated Workers Union of the Virgin Islands v. Hess Oil Virgin Islands Corp.*, 478 F.2d 540 (3d Cir. 1973), at 543, where the Court commented as follows:

> As we view it, it would appear that the rule was not intended to weigh the superiority of a class action against possible administrative relief. The 'superiority requirement' was intended to refer to the preferability of adjudicating claims of multiple-parties in one judicial proceeding and in one forum, rather than forcing each plaintiff to proceed by separate suit, and possibly requiring a defendant to answer suits growing out of one incident in geographically separated courts.
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> That possible administrative remedies were not intended to be considered as 'other available methods' in deciding whether the class action is maintainable under Rule 23 is suggested by several considerations. Initially, the 'superiority requirement' is stated in the same sentence that requires that the questions of law and fact common to the class members predominate over any questions affecting only individual members. Secondly, the factors stated to be pertinent to the two findings all relate to the desirability of having one suit instead of multiple suits. Finally, and perhaps most importantly, the advisory committee notes on the requirement focus on the question whether one suit is preferable to several . . . . We find no suggestion in the language of Rule 23, or in the committee notes, that the value of a class suit as a superior form of action was to be weighed against the advantages of an administrative remedy. We leave this question, however, for disposition in an appropriate case.

We are of the view that it would be entirely appropriate for a court to turn its mind to the possibility of class relief being secured in the course of administrative proceedings. Indeed, the superiority test that we have proposed contains one change in the terminology employed in Rule 23(b)(3) designed to make consideration of administrative proceedings clearly possible. The one alteration that we have made in the language is the substitution of the word "resolution" for "adjudication". This change is intended to ensure that any court determining the question of superiority will be able to look at all the traditional methods by which the controversy might be resolved, as well as at less traditional methods, such as administrative remedies.

However, the alternative of administrative proceedings requires careful consideration before the court will be in a position to determine that it is superior to a class action. For example, the administrative remedy may be simply prospective in nature, such as a cease and desist order under the *Business Practices Act*,[139] whereas the relief claimed in the class action may be both injunctive and monetary relief. In such a case, the administrative proceedings may not be a true alternative to the claims proceeding in class form.

(ii) Factors

Turning to the question whether a court should be provided with any criteria or guidelines to assist it in its determination of the superiority issue, it will be recalled that Rule 23(b)(3) of the United States Federal Rules of Civil Procedure refers to four separate factors relevant to superiority. For purposes of convenience, we set out these factors once again:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

In contrast to Rule 23(b)(3), the American Uniform Class Actions Act[140] lists thirteen factors relevant to the superiority test contained in that statute. At the other extreme, we have seen that the class action provisions of the Illinois Civil Practice Act, while making the appropriateness of a class action a prerequisite to certification, contain no guidelines to assist the court in determining this issue.[141]

In our view, a court would benefit greatly from some statutory guidance respecting the factors relevant to the superiority of a class action in a given case. Moreover, there are a number of factors that we believe should be addressed by the court in deciding the question of superiority. However, we do not favour attempting to provide the courts with an exhaustive list of

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[139] R.S.O. 1980, c. 55, s. 6.

[140] U.C.A.A., *supra*, note 108, §3(a). See *supra*, this ch., sec. 2(d).

[141] See discussion *supra*, this ch., sec. 2(b).

factors relevant to this issue; nor do we see a need for a lengthy catalogue of pertinent factors, as can be found in the American Uniform Class Actions Act. Consequently, we recommend that the attention of the court before which a certification application has been brought should be directed to the more significant factors germane to the superiority test that we have proposed.[142] In the opinion of the Commission, these are the following:

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(b) whether a significant number of members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class action would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practicable or less efficient; and

(e) whether the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other practical means.

We deal with these five factors in turn.

a. Common Questions Predominance

In chapter 8, it will be recalled, we discussed whether the predominance of common questions over questions affecting only individual members should be a prerequisite to the maintenance of a class action. This is now the case under Rule 23(b)(3) of the United States Federal Rules of Civil Procedure. While the Commission rejected a common questions predominance threshold test in favour of a simple common questions requirement, we stated that, in our view, the predominance of common questions over questions pertaining only to individual members of the class should be a factor relevant to the proposed superiority test, and we so recommended.[143]

Unquestionably, the superiority of a class action in any given case will depend, at least to some extent, upon the number and the complexity of the individual questions to which the class action gives rise. The greater the number of individual issues and the more complex these issues, the fewer the benefits to the administration of justice that may be derived from class proceedings. The preceding statement is not intended to suggest that the mere fact that common questions cannot be said to predominate should result inevitably in a conclusion that a class action cannot satisfy the recommended superiority test. For instance, it may well be the case that, even though common questions do not predominate over questions affecting only individ-

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[142] See Draft Bill, s. 4.

[143] See *supra*, ch. 8, sec. 3(c)(v), and see Draft Bill, s. 4(*a*).

ual class members, a class action will still prove to be "superior to other available methods for the fair and efficient resolution of the particular controversy". In other words, despite the prevalence of individual questions, a class action may still compare favourably with "other available methods" as a means of disposing of the particular dispute.

b. Individual Control of the Litigation

One of the matters pertinent to superiority under paragraph (A) of Rule 23(b)(3) is "the interest of members of the class in individually controlling the prosecution . . . of separate actions". The Commission favours a provision of this sort and recommends that the court consider "whether a significant number of members of the class have a valid interest in individually controlling the prosecution of separate actions".[144] The Commission's provision, it should be noted, alters the Rule 23 formula in two important ways. First, individual control of the litigation would become a factor relevant to superiority only if the court concluded that "a significant number" of class members was interested in such control. Secondly, the interest in individual control must be a "valid interest". This change from the language of Rule 23(b)(3)(A) is intended to ensure that the interest of individuals in controlling their own litigation has a role to play, but only where circumstances suggest that there is some cogent basis for such interest. As was pointed out earlier,[145] this is more likely to be the case where the claims of the class members are individually recoverable and the members have a strong personal interest in the litigation.

Again, we wish to put this superiority factor in some perspective. First, a conclusion by the court that "a significant number of absent members of the class have a valid interest in individually controlling the prosecution of separate actions" need not result in denial of certification. This factor is but one of many that the court may examine in determining the question of superiority; in a particular case, it may well be counterbalanced by other considerations favouring the continuation of the action in class form, such as judicial economy. Secondly, in a later chapter of this Report, we shall make a number of recommendations respecting the right of class members to exclude themselves from a class suit, which will permit a court to certify an action and still accommodate the interests of persons who wish to control their own litigation. It is recommended in chapter 12 that, after a class action has been certified, the court should be able to allow some or all the absent class members to opt out of the class action.

c. Other Litigation

Another factor that we recommend a court should be required to consider in determining the issue of the superiority of a class action is "whether the class action would involve claims that are or have been the subject of any other proceedings".[146] Other litigation, completed or pending,

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[144] See Draft Bill, s. 4(*b*).

[145] See discussion *supra*, this ch., sec. 2(a)(i).

[146] See Draft Bill, s. 4(*c*).

arising out of the same controversy as a class action may well indicate the viability, and perhaps the superiority, of other procedures for the fair and efficient resolution of the particular dispute. This may be the case, for example, where a great many individual actions have been brought, or where administrative proceedings are pending. The existence of other litigation, however, should not result inevitably in a finding by the court that the class proceedings are not superior. Because of the economies that most class actions will achieve by determining the rights of all class members in one action, a class action still may be superior to other available procedures for the fair and efficient resolution of the particular controversy, despite the existence of other pending or completed, and related, litigation.[147] In such a case, the court may decide to stay the individual actions until the class action has been resolved.

d. The Viability of Other Available Procedures

Earlier in this chapter, we described how some courts in the United States, in determining the superiority of class proceedings under Rule 23(b)(3), have considered hypothetical, as well as real, alternatives to a class action. To avoid this anomalous result, we recommend that a court should consider "whether other means of resolving the claims are less practicable or less efficient" than a class action.[148] We recognize that this factor may appear redundant, given that the superiority requirement obligates the court to find that a class action is "superior to other available procedures". However, precedent for the inclusion of such a provision is to be found in the Uniform Class Actions Act.[149]

The purpose of including this factor in the list of matters to which a court must direct its attention in determining the issue of superiority is to ensure that only truly available procedural alternatives to a class action are reviewed by the court. Put somewhat differently, we have sought, by making specific reference to the practicability and efficiency of other procedures, to guarantee that Ontario courts will not resort to the cases under Rule 23 in which hypothetical procedural alternatives have been used as a basis for refusing to certify actions as class actions.

e. Manageability

The Commission is of the opinion that, as in the case of Rule 23,[150] and most of the other class action legislation and proposals that we have considered, the superiority requirement contained in the proposed *Class Actions Act* should make specific reference to the administrative burdens that may result from a class action. Accordingly, we recommend that "whether the administration of the class action would create greater difficulties than those

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[147] See sources cited *supra*, note 35.

[148] See Draft Bill, s. 4(*d*).

[149] See U.C.A.A. *supra*, note 108, §3(a)(6).

[150] Fed. R. Civ. P. 23(b)(3)(D).

likely to be experienced if relief were sought by other practical means" should be another factor to be weighed by the court in deciding the question of superiority.[151] The "management" provision that we propose is intended to avoid many of the pitfalls of Rule 23(b)(3)(D), as interpreted by the American case law. The Commission's proposal makes it perfectly clear that, in examining the administrative difficulties likely to result from a class action, the court must weigh these difficulties against the problems that might be caused by proceeding against the defendant in some other fashion. Under this heading, for example, a court could consider the size of the class and notice problems that might result from proceeding in class form, as compared to the consequences of the claims being prosecuted in many individual actions, or in an action in which some or all the class members join against the defendant.

We have shunned the manageability terminology found in Rule 23(b)(3)(D) in favour of the language used, for example, in Bills C-42 and C-13[152] and in the South Australia Draft Bill for a Class Actions Act[153] for another reason. It will be recalled from our earlier discussion of Rule 23(b)(3)(D)[154] that a number of American courts have undertaken an apparently unauthorized cost-benefit analysis of class actions under the rubric of the management provision. We wish to avoid this result. In our opinion, this type of analysis does not properly form part of a superiority test, since the result of any such analysis is not compared with the costs and benefits of "other available methods for the fair and efficient resolution of the particular controversy". We are not suggesting that such an analysis should not take place, only that it not be undertaken in the context of a superiority determination. Rather, as indicated, we believe that a court should be empowered expressly to refuse to certify a class action where the adverse effects of the proceedings upon the class, the courts, or the public would outweigh the benefits to the class, the courts or the public.

Before turning to consider the cost-benefit test that we propose should form part of any future *Class Actions Act*, we wish to comment briefly on the absence in our recommendations of a provision equivalent to Rule 23(b)(3)(C) of the United States Federal Rules of Civil Procedure. This subdivision of Rule 23 requires a court to have regard to "the desirability or undesirability of concentrating the litigation of the claims in the particular forum". In our view, there is no need to include such a provision in the *Class Actions Act* proposed by the Commission because of the well-established doctrine of *forum conveniens* or *forum non conveniens* that may be invoked in any action brought in an Ontario court.[155] If the action is one that should not be heard in Ontario, the defendant will always be free to make an argument to that effect.

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[151] See Draft Bill, s. 4(*e*).

[152] See Bill C-42 and Bill C-13, *supra*, note 116, s. 39.12(3)(*b*).

[153] See South Australia Draft Bill, *supra*, note 121, s. 3(4)(*b*).

[154] See discussion *supra*, this ch., sec. 2(a)(iv).

[155] For a discussion of the doctrine, see Castel, *Canadian Conflict of Laws* (1975), Vol. 1, at 281-95.

We should point out, however, that Rule 23(b)(3)(C) is directed not only at the doctrine of *forum non conveniens*. It also relates to the particular structure of the federal courts in the United States, established, as they are, in large districts. The subdivision, it would appear, is intended to ensure that the claims are brought and heard in an appropriate district court or courts. In Ontario, this notion of the appropriate venue for actions is governed by statute[156] and by the Supreme Court of Ontario Rules of Practice.[157] In the case of actions in the Supreme Court of Ontario[158] and in the county or district courts,[159] provisions exist to ensure that an action is heard in the appropriate county. Consequently, we see no reason to raise the issue of the proper venue to the level of a factor relevant to the superiority issue, for where an action is brought in the wrong court, the answer is not to dismiss the action, but rather to have the venue of the proceedings changed. As we have said, this can be done under the present law.

(c) A Cost-Benefit Provision

We turn now to discuss the Commission's proposed cost-benefit provision, the second stage of the provision intended to take the place of the superiority requirement of Rule 23. As we have seen, a number of courts in the United States have refused to allow class actions to proceed under the superiority provision, even though there was no real alternative to a class action, and, as a result, the class members would be denied any relief. This would appear to be the case, notwithstanding the fact that a non-comparative cost-benefit analysis of a class action would not seem to be sanctioned by the language of Rule 23(b)(3), which requires the court to find that a class action is superior "*to other available methods* for the fair and efficient adjudication of the controversy".

While the Commission agrees that a cost-benefit analysis of a class action does not seem to come within the terms of Rule 23(b)(3), and should not form part of the superiority provision that we have recommended should be included in the proposed *Class Actions Act*, as indicated earlier, we are not opposed to a court, on an application for certification of a class action, undertaking a cost-benefit analysis of the suit, and denying certification where it concludes that the costs are likely to exceed the benefits that will accrue if the action is successful. Indeed, we favour resort to such an analysis in appropriate circumstances. Therefore, the Commission recommends that, where a court determines that a class action is superior, and that the other prerequisites for certification have been satisfied, it nevertheless should be able to consider whether the adverse effects of the proceedings upon the class, the courts, or the public will outweigh its benefits, and if so, the court should refuse to certify the class action.[160]

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[156] See, for example, the *County Courts Act*, R.S.O. 1980, c. 100, s. 22(1).

[157] *Supra*, note 125, r. 245.

[158] *Ibid.*

[159] See, for example, *supra*, note 156, s. 17.

[160] See Draft Bill, s. 6(1).

The Commission is well aware that a cost-benefit analysis of class actions is a clear departure from the rules that govern ordinary individual litigation in this Province. In an individual action, an Ontario court cannot refuse to allow the action to proceed on the ground that the benefits to be derived therefrom will be outweighed by the costs of prosecuting the action. In a sense, a cost-benefit analysis does take place, but it is for the parties to the action to determine the utility of the action going forward, not the court. Why, then, should a class action be treated differently?

The rationale for a cost-benefit analysis of class actions is as follows. Even though a court finds that a class action in a particular case is superior to other available methods for the fair and efficient resolution of the controversy, a class action, nevertheless, may impose a tremendous burden upon the administration of justice in Ontario. For example, some class actions, if allowed to proceed, would prove to be such a drain on the judicial resources of this Province that they would have a detrimental effect on the resolution of other litigation. Given that the judicial resources of the Province, as in every other jurisdiction, are finite, we are of the opinion that, where the benefits that could be realized from the successful prosecution of a class action are likely to be insignificant in comparison to its anticipated adverse effects, it is entirely appropriate for a court, in the public interest, to be empowered to refuse to certify the action.

• We recognize that giving the courts the power to deny certification in the circumstances described may effectively deny relief to class members in some cases. Where the members of the class have claims that are individually nonrecoverable or nonviable, they will be unable, practically speaking, to press their claims in any other way. While such a result would be most unwelcome to the aggrieved class members, in some cases it may be justifiable in the larger public interest. •

Even where certification is denied on the ground that the costs outweigh the benefits of a class action, express consideration of the cost-benefit question may have salutary long term effects. For example, if a class action is denied certification under the cost-benefit provision because the action would impose too onerous a burden on the administration of justice, and the right sought to be vindicated is an important one, the court's decision may indicate the need for an increase in the judicial resources of the Province. A "no relief" result also may alert the Legislature to the need to create more effective and efficient remedies in some areas of the law to ensure that important legal rights are promoted and guaranteed. While a legislative response to "no relief" cases may be little solace to the members of a class whose rights will not be vindicated in the class proceedings, or in any other proceedings for that matter, the Commission is of the opinion that judicial recognition of remedial gaps in the law may nevertheless serve an important purpose.

The question to which we now must turn our attention is the following: what matters should a court consider in the course of the proposed cost-benefit analysis of a class action? We are of the view that a court undertaking a cost-benefit analysis of a particular class action should conduct a wide-ranging inquiry with respect to the purposes of the action, the costs of litigating it, and the benefits that are likely to result from its successful prosecution. The

Commission does not believe that it can provide the courts with a definitive set of statutory guidelines in this regard, since the circumstances that may give rise to a class action are almost limitless. Nevertheless, we believe that a brief enumeration of a variety of factors may be of some value.

For example, it would be open to a court to consider whether the benefits of a particular class action are outweighed by the burden that the action would place upon the resources of the court. It will be recalled that the Attorney General, in referring class actions to the Commission, asked that the Commission consider specifically the impact of an expanded class action procedure upon the courts.

Another matter that obviously would be relevant to any cost-benefit analysis is the probable cost of litigating the action in relation to the monetary relief to be achieved thereby. Where the legal fees and disbursements incurred in the prosecution of a class action are likely to exceed the amount that would be recovered, then, clearly, a question of the utility of the action would arise. A further factor relevant to the cost-benefit determination would be the cost of distributing to class members any funds that might be recovered by means of a class action, as compared with the amount of their actual recovery. Even where a particular class action results in the creation of a fund that exceeds the costs of the litigation, the cost of distributing to each class member his share of the recovery may well be greater than the individual's share. For example, the expense involved in giving notice to each class member of his right to share in the fund, and in processing his claim, may be so substantial as to consume any possible recovery.

In making the abovementioned type of determination, a court should take into account the powers available to it under the proposed *Class Actions Act* to facilitate and expedite the proceedings. In subsequent chapters, we shall make recommendations regarding notice[161] and the assessment and distribution of monetary relief,[162] and shall recommend that courts should have a broad discretion to design expeditious and efficacious individual

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[161] See *infra*, ch. 13.

[162] See *infra*, ch. 14. For example, the Commission will recommend that, in appropriate circumstances, the court should be empowered to determine the aggregate amount of the defendant's liability to the class, without the necessity of individual proof by the class members. Where an aggregate award is appropriate, the net benefit of the class action is likely to be greater, as the costs involved in individual proof will be obviated. In the case of an aggregate award, the Commission will further recommend that direct distribution, under court supervision, by the defendant of the fund recovered to those individual class members entitled to share in the recovery should be possible. Such a procedure, again, should ensure that the individual's share of the recovery is maximized, since distribution costs will be kept to a minimum in such cases. Even in a case where the court determines that individual proof of entitlement to a share of the class action recovery is necessary, we have sought to minimize the expense of such individual proof. In such a case, we shall propose that the court should be empowered to adopt such procedures for processing or verifying the claims of the class members as shall minimize the burden imposed upon the class members. Among the procedures upon which a court could rely in such circumstances are the use of standardized proof of claim forms, the reception of affidavit, documentary or other written evidence, and the auditing of claims upon a sampling or other basis.

proceedings.[163] A proper gauging of the costs and benefits of a class action will not be possible without reference to these important powers of the court.

In determining the benefits to be derived from a class action, the court should consider, in addition to any monetary benefit to be received by the class members, the deterrent effects of a successful prosecution of the class action. Although our primary rationale for reform of the present class action procedure is a desire to achieve compensation for those whose claims do not support individual litigation, reform of the Rule can be justified on other grounds as well. A class action that requires the defendant to compensate a large group of persons will also, incidentally, deter him from future wrongful conduct. Even where compensation of class members is not possible – because the costs of asserting individual claims will exceed a class member's recovery – a class action may nevertheless achieve deterrence if, for example, the defendant is required to pay the amount for which he has been held liable into court and the sum is forfeited to the Crown.[164] Moreover, the potential of a class action for deterrence may well extend beyond the defendant in the suit. The successful prosecution of a class action may discourage persons in a position similar to that of the defendant from acting improperly in the future. The Commission is of the view that it should be open to a court to permit an action to proceed in class form even where compensation of class members may not be possible. In other words, we are of the opinion that the fact that a class action consists primarily of nonviable claims – and, therefore, by definition, will result in no monetary benefit for most members of the class – should not necessarily result in denial of certification under the cost-benefit provision. Rather, the court should be entitled to weigh the potential of the class action to deter wrongful conduct, on the part of the defendant and others similarly situated, against the costs of permitting the action to proceed.

A concomitant of the deterrent aspect of class actions is the prevention of unjust enrichment by defendants that will be realized in some cases. Where the defendant has improperly or illegally obtained moneys from a large group of persons, requiring him to disgorge the moneys may not only deter others from attempting to do the same, but also will ensure that the particular defendant will not be unjustly enriched.

Another "cost" that may be relevant in the case of some class actions is the possible distortion of the substantive law that might result from a particular class action. Earlier in this Report,[165] we considered this possibility as an argument against the expansion of the present Ontario class action procedure. While we are not convinced by this argument as a justification for maintaining the *status quo* in the law of class actions, we do believe that the possibility of distortion of the substantive law is a matter that a court should be able to take into account at the cost-benefit stage of the certification process. Otherwise, the court may feel constrained by the language of a particular statute to permit a class action to proceed even where it is of the

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[163] See *infra*, ch. 15.

[164] See *infra*, ch. 14, secs. 3(c)(v) and (vi), for a discussion of methods of disposing of damages that cannot be distributed directly to class members.

[165] See *supra*, ch. 4, sec. 3(b)(ix). See, also, the discussion of this matter *supra*, this ch., sec. 2(a)(v)e.

view that it would be inconsistent with legislative intent to allow the cause of action to be asserted in class form.

In the opinion of the Commission, the adverse effects of a class action upon the defendant should be irrelevant for the purposes of the proposed cost-benefit test. This view reflects the fact that a successful class action, by definition, will always have adverse effects upon the defendant. The defendant will already have had an opportunity to argue, under the very broad wording of the superiority provision recommended in the previous section, that some other means of determining the merits of the claims of the class is preferable to a class action because it is fairer to the defence. If the court nevertheless determines that the class action is the best way of resolving the controversy, and if it has previously determined under the recommended preliminary test on the merits that there is sufficient merit in the class action that it should be allowed to proceed, it is difficult to see why the defendant should have any greater opportunity to avoid the imposition of liability in class actions than in individual suits, where such adverse effects are restricted to the defendant itself. If, however, the effect of a judgment on the defendant were to affect the public in turn – by, for example, shutting down a major employer in a small community – we believe that this "cost" should be part of the cost-benefit analysis.

Two final matters remain to be discussed. First, we are of the view that the onus of showing that the adverse effects of a class action are likely to outweigh any benefits to be derived therefrom should be on the person who so contends, rather than on the plaintiff, and we so recommend.[166] We have little difficulty justifying this recommendation. It must be remembered that the cost-benefit test will be applied by the court only after it has concluded that a class action is superior to other available procedures for the fair and efficient resolution of the controversy and that the class action is otherwise appropriate for class treatment. Moreover, since vague allegations that a class action is against the public interest will be easy to make and very difficult to refute, it seems appropriate that the burden of demonstrating specifically that class members should be denied relief to which they would otherwise be entitled on these grounds should be imposed upon the persons making such allegations, rather than upon the representative plaintiff.

Secondly, we wish to add a few comments on the role of the Attorney General in cases where the court is called upon to balance the costs and benefits of a class action. It will be recalled that, although we favour the adoption of a class action procedure that may be described as private rather than public, the Commission has proposed that the Attorney General should have a role to play in some cases.[167] The Commission recommended that, at any stage of a class action, the court should be able to invite the Attorney General, and the Attorney General should be able to apply to the court, to intervene for the purpose of making submissions concerning any aspect of the proceedings that raises a matter of public interest.[168]

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[166] See Draft Bill, s. 6(2).

[167] See *supra*, ch. 6, sec. 1(b)(v).

[168] *Ibid.*, and see Draft Bill, s. 12(2).

The participation of the Attorney General could be particularly valuable to a court in the context of the cost-benefit determination; as a public representative, the Attorney General is in an excellent position to provide advice on the extent to which a class action is consistent with a particular cause of action, the importance of deterrence in a particular case, or the merits of a defendant's contention that its purported bankruptcy would not be in the public interest. It should be noted, however, that the recommendation that places the onus of demonstrating that a class action should not be certified because its disadvantages outweigh its advantages upon the person making that contention would apply to the Attorney General, as well as to the defendant. Because of the extraordinary potential of this section to bar the enforcement of valid causes of action, it seems fair that even the Attorney General should be subject to a duty to demonstrate clearly that such a result is imperative before class members are penalized in this manner.

Recommendations

The Commission makes the following recommendations:

1. The Ontario *Class Actions Act* should contain, as a prerequisite to certification, a two-stage superiority test that is a modified version of the superiority provision found in Rule 23(b)(3) of the United States Federal Rules of Civil Procedure. Under this test, as outlined in Recommendations 2 and 3, the court should be required to make a true superiority analysis, comparing class actions with other available alternatives, and should be empowered expressly to undertake a cost-benefit analysis of the class action.

2. A court should certify an action as a class action only if it is satisfied that a class action would be superior to other available methods for the fair and efficient resolution of the controversy, and in determining this issue the court should consider, *inter alia*, the following factors:

   (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

   (b) whether a significant number of members of the class have a valid interest in individually controlling the prosecution of separate actions;

   (c) whether the class action would involve claims that are or have been the subject of any other proceedings;

   (d) whether other means of resolving the claims are less practicable or less efficient; and

   (e) whether the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other practical means.

3. Where a court determines that a class action is superior to other available methods for the fair and efficient resolution of the controversy, and that the other prerequisites for certification are satisfied, it nevertheless should

be able to consider whether the adverse effects of class proceedings upon the class, the courts or the public will outweigh its benefits, and if so, the court should refuse to certify the action as a class action.

4. The onus of showing that the adverse effects of a class action are likely to outweigh any benefits to be derived therefrom should be on the person who so contends, rather than on the representative plaintiff.

CHAPTER 10

THE CERTIFICATION HEARING

Having decided upon the prerequisites for the certification of an action brought in class form, we turn our attention to the certification hearing. Among the matters that we shall discuss in this chapter are the timing of the certification application, the manner of putting evidence before the court on the certification hearing, and the certification order.

1. TIMING OF THE CERTIFICATION APPLICATION

As we pointed out in an earlier chapter,[1] under Rule 75 of the Supreme Court of Ontario Rules of Practice,[2] a person who wishes to bring an action in class form need not obtain authorization from the court to do so. Therefore, it is not surprising that plaintiff class actions are not subject to any special procedural time constraints. A representative plaintiff need comply only with the time limits imposed on all actions in respect of such matters as pleadings and the setting down of the action for trial. Even in the case of a defendant class action, where the approval of the court is necessary before the action can be maintained in class form, Rule 75 prescribes no time within which application for approval must be brought. Since we have recommended that a representative plaintiff should be required to obtain the court's permission to bring an action in class form, it is necessary to determine whether a time should be prescribed within which the motion or application for certification of the action should be brought.

The model for our proposed class action statute, Rule 23 of the United States Federal Rules of Civil Procedure,[3] does not prescribe a specific time for seeking an order of the court permitting an action to be maintained as a class action. Instead, subdivision (c)(1) of Rule 23 provides simply that, "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained".[4]

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[1] See *supra*, ch. 2, sec. 2(c)(iii)a.

[2] Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540.

[3] Fed. R. Civ. P. 23, promulgated at 383 U.S. 1029 (1966).

[4] See, also, Tex. R. Civ. P. 42(c)(1), and Illinois Civil Practice Act, Ill. Ann. Stat. ch. 110, §57.3(a) (Smith-Hurd 1981 Supp.). And see National Conference of Commissioners on

This failure to stipulate a precise time within which a motion for certification must be brought has led some courts to suggest that they can actually wait until *after* a decision on the merits of the case to decide whether the action should be certified as a class action.[5] However, there are indications that appellate courts are signalling that the motion for certification should take place within a reasonable time after the action is filed.[6]

In contrast to Rule 23(c)(1), many of the recently enacted or proposed class action statutes and rules do specify the time within which the application for certification should be launched. For example, the class action procedure introduced recently in New York requires that, "[w]ithin sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained".[7] The Draft Bill for a Class Actions Act proposed by the Law Reform Committee of South Australia[8] is similar in effect to the New York procedure. Section 3(1) and (2) of the South Australia Draft Bill reads as follows:

> 3.-(1) After the commencement of an action brought under section 2 the plaintiff shall apply to the Court for an order that the action is to be maintained as a class action.
>
> (2) The plaintiff shall apply to the Court under subsection (1) –
>
> (i) if the defendant has filed an appearance, on notice to the defendant within one month after the date of the appearance or within such further time as the Court may allow;
>
> (ii) if the defendant has not filed an appearance within the time limited by the rules of procedure of the Court, within one month after the date of the default or within such further time as the Court may allow.

It should be noted, however, that the South Australia Draft Bill fixes a time of only one month within which to seek the necessary court order for the maintenance of a class action, and that this time is to be calculated with

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Uniform State Laws, Uniform Class Actions Act, Uniform Laws Ann. (1975), Vol. 12 (Cum. Supp. 1981), at 20, §2(a), (hereinafter referred to as "U.C.A.A."), which states that, "[u]nless deferred by the court, as soon as practicable after the commencement of a class action the court shall hold a hearing and determine whether or not the action is to be maintained as a class action . . .". A similar formulation was used in *An Act to Amend the Combines Investigation Act*, Bill C-42, 1977 (30th Parl. 2d Sess.), s. 39.12(1) (hereinafter referred to as "Bill C-42"), and *An Act to Amend the Combines Investigation Act*, Bill C-13, 1977 (30th Parl. 3d Sess.), s.39.12(1) (hereinafter referred to as "Bill C-13"). Neither Bill proceeded beyond first reading.

[5] See Wright and Miller, *Federal Practice and Procedure* (1972), Vol. 7A (Cum. Supp. 1980), §1785, at 100-01.

[6] See Note, "Developments in the Law – Class Actions" (1976), 89 Harv. L. Rev. 1318, at 1422.

[7] N.Y. Civ. Prac. Law §902 (McKinney).

[8] See Law Reform Committee of South Australia, "Draft Bill for a Class Actions Act", in *Thirty-sixth Report Relating to Class Actions* (1977), at 12, s. 3(2) (hereinafter referred to as "South Australia Draft Bill").

reference to the filing of the defendant's appearance. This brief period within which to make application is to be compared with the sixty day period in the New York legislation, which is tied to the later procedural step of the filing of the defendant's statement of defence.

Both the South Australia proposal and the New York class action rule stipulate only the time for the bringing of the certification application. The proposals put forth by the Office for Improvements in the Administration of Justice of the United States Department of Justice, on the other hand, deal not only with the timing of the certification application, but also with the time within which the certification hearing or "preliminary hearing" must be held. In Bill H.R. 5103,[9] for example, section 3022(a)(1) and (2) states as follows:

> 3022.(a)(1) Within thirty days after a public or class compensatory action is commenced, the court shall give notice to the parties and to the relator, if any, of a preliminary hearing to be held to determine whether, and in what manner, the action shall proceed. The hearing shall be held no later than one hundred and twenty days from the date of the commencement of the action.
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> (2) In a public action the court may, on the petition of the United States within sixty days of service upon it of the complaint and summons in an action brought on relation pursuant to section 3002(a), grant a reasonable postponement of the hearing to permit the completion of a related Federal or State investigation in progress on the date of the commencement of the action or promptly commenced after the service upon the United States.

Interestingly, under paragraph (a)(1) of section 3022 of Bill H.R. 5103, it is the court that initiates the "preliminary hearing", and not the parties.

The Commission favours establishing a time limit for applications for certification. We believe that an early disposition of the certification application will help to ensure that the interests of the defendant and the absent class members are safeguarded. In the case of the defendant, it will minimize any adverse consequences resulting from the launching of a class action against him, by making possible an early resolution of a putative class action. With respect to absent class members, if certification is denied, an early disposition will afford them an opportunity to evaluate or re-evaluate the advisability of taking other steps to secure relief. In addition, the time limit that we shall propose may help to ensure that the court deciding the issue of certification is not confronted with an action that has become stale.

At the same time, we are concerned that the parties should have sufficient time to prepare properly for the certification hearing, and especially to gather

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[9] Small Business Judicial Access Act of 1979, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill H.R. 5103, 96th Cong., 1st Sess. (1979) (hereinafter referred to as "O.I.A.J. Bill H.R. 5103"). For the earlier Senate version of this Bill, see A Bill To provide for the reform of class action litigation procedures, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill S. 3475, 95th Cong., 2d Sess. (1978) (hereinafter referred to as "O.I.A.J. Bill S. 3475"). The comparable provision in Bill S. 3475 was §3004(a). See, also, draft legislation being considered by a Committee of the American Bar Association, Section of Litigation, *Proposed Class Action Legislation* (tentative draft, May 1980), §3002(a)(1) (hereinafter referred to as "Proposed A.B.A. Legislation").

the information necessary to meet the certification tests that we have proposed in chapters 7, 8, and 9. It is the opinion of the Commission that a ninety day period, measured from the filing by the defendant of his appearance or from the date when the appearance should have been filed, is a reasonable period within which to complete preparations for the certification hearing.[10] In the case of the representative plaintiff, it must be remembered that this ninety day period is in addition to the time between the cause of action arising and the serving of the writ of summons and statement of claim upon the defendant.

Although we favour setting a time limit for the bringing of a certification application, we do not believe that it would be useful to fix a date for the hearing of the application. Since the proposed certification procedure for class actions will be entirely new to this jurisdiction, it is difficult to estimate the time that will be required to dispose of an application for certification. Rather than choosing an arbitrary time within which this issue should be determined – one that may or may not be a realistic estimate of the time necessary to complete all the steps prior to the certification hearing – we believe that it is best to have the parties determine the matter. The representative plaintiff is unlikely to wish to protract the certification hearing. Similarly, if a class action, like any action involving a large claim, has put the defendant under a financial cloud, or has subjected him to adverse publicity, he too will be desirous of an early disposition of the certification application. Finally, we should point out that, in the next chapter, we shall recommend that courts seized with a class action should have broad powers to make appropriate orders determining the course of the action for the purpose of ensuring the fair and expeditious resolution thereof.[11] Consequently, if either the representative plaintiff or the defendant in a class action were to act in such a way as to delay the certification hearing, the court, under this recommendation, would be able to order its early disposition. Therefore, insofar as the timing of the certification application is concerned, the Commission recommends that an application for certification should be commenced within ninety days from the day upon which the defendant files his appearance, or within ninety days from his default in so doing.[12]

2. EVIDENCE AND THE CERTIFICATION HEARING

In chapter 7, the Commission proposed that, as a prerequisite to the certification of a class action, the representative plaintiff should be required to establish that he has a reasonable possibility of succeeding at trial. In chapter 8, the Commission prescribed three further prerequisites for certifica-

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[10] For example, under the Commission's recommendations, the representative plaintiff and the defendant will both be required, for the purposes of the certification hearing, to file an affidavit setting out all the facts within their knowledge pertinent to the certification tests proposed in chapters 7, 8, and 9. Undoubtedly, investigations and the drafting of the necessary affidavits will take some time. For the Commission's recommendations regarding the filing of affidavits, see *infra*, this ch., sec. 2.

[11] See *infra*, ch. 11, sec. 3(b)(i).

[12] See Draft Bill, s. 3(2).

tion, that is, numerosity and commonality requirements, and satisfactory evidence of the adequacy of the named plaintiff and his counsel as representatives of the class on whose behalf the action is brought. Chapter 9 was devoted to an examination of the final requirement for certification imposed upon the representative plaintiff – the need to show the superiority of the class action procedure to other available procedures. We also discussed in chapter 9 the right of the defendant in a class action to ask the court to refuse to certify a class action that has met the five prerequisites just mentioned on the ground that the costs of proceeding by way of a class action exceed the benefits to be secured thereby. If the court determining the certification application is to be in a position to determine these various issues, it must have placed before it sufficient material to enable it to make an informed decision.

At the present time, under the Supreme Court of Ontario Rules of Practice, there are a number of different ways in which evidence can be put before a court on an interlocutory motion. For example, Rule 228 provides that "[e]vidence upon a motion may be given by affidavit". A person who makes an affidavit to be used upon a motion "may be cross-examined thereon before any officer having jurisdiction in the county in which the witness resides".[13] Cross-examination on an affidavit, it has been held, is not restricted to the four corners of the affidavit, but rather can be wide-ranging, and may include questions relevant to the matter in issue in the application on which the affidavit is filed.[14]

In addition to the use of affidavits and cross-examination thereon, the Rules of Practice contain a number of other methods by which evidence can be brought to the attention of the court. First, Rule 230 states that "[a]ny party may by subpoena require the attendance of a witness to be examined . . . for the purpose of using his evidence upon any motion". Secondly, by leave of the court, witnesses may be examined *viva voce* before the court upon any motion.[15] This latter evidentiary technique is employed only in exceptional circumstances.[16]

The question that we have had to ask ourselves is whether these methods of putting information before a court on an interlocutory motion are sufficient for the purposes of the certification hearing that we anticipate will take place in every class action. Given the access function[17] served by class actions and the importance of the certification hearing as the major obstacle to the maintenance of class actions, the Commission is of the opinion that,

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[13] See *supra*, note 2, r. 229(1).

[14] See Williston and Rolls, *The Law of Civil Procedure* (1970), Vol. 1, at 489-91.

[15] *Supra*, note 2, r. 231.

[16] See Williston and Rolls, *supra*, note 14, at 491-92. See, for example, *Re Canada Metal Co. Ltd. and Heap* (1975), 7 O.R. (2d) 185, 54 D.L.R. (3d) 641 (C.A.). For a discussion of the use that can be made of these procedures in respect of absent class members, see *infra*, ch. 16.

[17] See discussion, *supra*, ch. 4, sec. 3(a)(ii).

while in many cases the evidentiary devices described would enable the court to make an informed decision, in some cases the court might well be denied information relevant to the certification tests that we have proposed.

The reason for this is simple. Under the present law, the respondent to an interlocutory motion is not obliged to file an affidavit setting out his version of the relevant facts. Rule 228, mentioned earlier, simply authorizes the giving of evidence on a motion by affidavit; it does not require that each party file an affidavit. The decision whether an affidavit should be filed is left entirely to the discretion of the respondent and his counsel.

If we were to adopt a similar approach to the certification hearing, it is not difficult to envisage the defendant, respondent to the certification application, preferring to remain silent. Since the representative plaintiff bears the onus of satisfying the court on the certification tests, except the cost-benefit test, it is understandable that the defendant might decide against the filing of an affidavit. To do so would subject him to cross-examination on his affidavit by the representative plaintiff's counsel. Where the affidavit of the plaintiff is considered by the defendant to be weak, the incentive for the defendant to remain silent is that much stronger. As we have stated, given the benefits of class actions generally, and the critical importance of the certification motion, we believe that there is a case for deviating from the normal procedures.

One alternative considered by the Commission to the present evidentiary provisions in respect of interlocutory motions is pre-certification discovery. Although under the present rules of civil procedure discovery is available only after all pleadings have been exchanged,[18] it is possible to argue in favour of a right of discovery before the holding of the certification hearing, at least in respect of matters pertinent to the hearing. A right of discovery would guarantee that the court would have available to it all the relevant information in the possession of the parties to the class action.

The benefits of pre-certification discovery have been recognized by some courts in the United States.[19] On numerous occasions, courts have permitted pre-certification discovery in order to enable the representative plaintiff to gain more information relevant to the maintainability of the action as a class action. In some instances, courts have permitted the defendant to discover the representative plaintiff with respect to such matters as the representative plaintiff's financial means, on the ground that this information was relevant to the adequacy of representation requirement under Rule 23(a)(4).[20] Frequently courts have deferred the issue of certification until the parties have had an opportunity to discover one another and to provide the court with a

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[18] See *supra*, note 2, rr. 326-52. In some jurisdictions, a limited form of discovery is available prior to the final exchange of the pleadings: see, for example, Prince Edward Island Rules of Court, r. 18.02.

[19] See Newberg, *Newberg on Class Actions* (1977), Vol. 2, §2820, at 1254-55.

[20] For the Commission's recommendations regarding the relevance of the representative plaintiff's financial resources in respect of the adequacy of representation test, see *supra*, ch. 8, sec. 4(c)(ii)b.

more complete record of the relevant facts. The preceding discussion, it must be remembered, is in respect of a class action Rule that does not impose upon the representative plaintiff the obligation of satisfying a preliminary merits test. The Commission, by comparison, envisages a central role for a preliminary merits test in the case of every certification application.

Despite the prominent role that we propose to ascribe to the preliminary merits test at the certification hearing, we nonetheless do not believe that pre-certification discovery is necessary or desirable. The use of pre-certification discovery in the United States in connection with Rule 23 must be seen against the background of American practice and procedure. Cross-examination on affidavits is not available in the United States; discovery is the traditional means of garnering information.

In Ontario, on the other hand, cross-examination on affidavits is a recognized and accepted means of securing information. Consequently, we see no need for pre-certification discovery, assuming that one fundamental change is made in the procedure respecting cross-examination on affidavits.

Given the Commission's recommendations concerning the certification of class actions, the major drawback of the evidentiary provisions of the Supreme Court of Ontario Rules of Practice respecting interlocutory motions is the right of the respondent to cross-examine the applicant on his affidavit, while filing none of his own. In our view, it is imperative that the court determining the certification issue be apprised of all pertinent information. The way to realize this objective, in the opinion of the Commission, is to require both the representative plaintiff and the defendant to file one or more affidavits setting out all the facts material to the proposed certification tests upon which they intend to rely, and to permit the parties to examine the deponents of any such affidavits. We so recommend.[21]

It may be argued that the above recommendation is a radical response to the need to ensure that the court seized with the certification issue will be in the best position to make a reasoned decision with respect to certification. This recommendation, it may be contended, will force defendants to provide the plaintiff with the information necessary to build a case. In some cases, this may well be the result of our recommendation: the representative plaintiff will have at his disposal more information than he otherwise might have. The purpose of our recommendation, however, is not to arm the representative plaintiff, but rather to enable the court to determine the certifcation issue as fairly as possible. Moreover, we do not believe that the prejudice to defendants from our recommendation should be overemphasized. While some defendants would avail themselves of the right to remain silent in the face of an application for the certification of a class action, this course of inaction would probably be the exception rather than the rule. Given the amounts that are likely to be at stake in class actions, most defendants will devote a great

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[21] See Draft Bill, s. 8. For a similar proposal in the context of applications for summary judgment, see Province of Ontario, Ministry of the Attorney General, Civil Procedure Revision Committee, untitled report (June 1980), Proposed Rules of Civil Procedure, rr. 22.02 and 22.03.

deal of time and effort to convincing the court that the certification requirements are not satisfied. In the vast majority of cases, this objective will be attainable only if the defendant files his own affidavit to support his argument that certification should be refused. The benefits of the proposed requirement that the parties file an affidavit stating all the facts material to certification upon which they intend to rely, in our view, far outweigh the "cost" of depriving the respondent on an interlocutory motion of his ordinary right to remain silent, but yet to cross-examine the deponent on any affidavit that he has filed in support of the application.

Finally, we question the basis upon which a defendant should enjoy a "right" to remain silent. Even if one accepts that the defendant has a right to call no evidence at trial, it does not follow that there are no distinguishing circumstances in respect of the certification motion. At trial, facts are in issue, and the resolution of these facts by the trial judge will lead to a conclusive finding that the defendant is or is not liable. In addition, the plaintiff is presenting his case after an opportunity for discovery, a process that allows him to examine the basis for the defendant's defence and to ask questions that support and particularize the plaintiff's own case.

3. THE NEED FOR A RECORD

At present, the Supreme Court of Ontario Rules of Practice make the filing of a "record" mandatory on a great many motions.[22] A record is a compilation of a number of documents and other material that will facilitate the disposition of a motion. The general provision respecting the filing of a record where a motion is made to a judge of the High Court is Rule 238(2). The information to be contained in the record prescribed by this Rule includes an index, the notice of motion, and a list of all relevant transcripts of evidence in chronological order. In addition, the record may contain "[s]uch other material as is necessary for the due hearing of the . . . motion".[23] It should be noted that Rule 238(2) does not obligate the parties to file a statement of facts and law relied on by them. Given the nature of the issues to be determined at the certification stage of class actions, the Commission is of the view that a record similar to that required under Rule 238(2) of the present Supreme Court of Ontario Rules of Practice would serve a useful purpose. It would provide the court with a clear picture of the matters in dispute and the evidence upon which the applicant is relying. Such a record, we believe, is the minimum assistance that the court should receive from the applicant.

The Commission has also considered a requirement similar to that found in Rule 238(1). The record required to be filed by an applicant in accordance with Rule 238(1)(a)(iv) must contain "[a] concise statement, without argument, of the facts and law relied on by the . . . applicant".[24] Under Rule

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[22] See, for example, r. 238(1) of the Supreme Court of Ontario Rules of Practice, *supra*, note 2.

[23] *Ibid.*, r. 238(2)(a)(v).

[24] *Ibid.*, r. 238(1)(a)(iv).

238(1)(b)(ii), a respondent to a motion coming within the terms of Rule 238(1) must, on or before the day prior to the motion, file and serve "a concise statement, without argument, of the facts and law relied on by him". The Commission recognizes the benefits to be gained from such a requirement. The complexity and probable length of most certification motions would suggest that a statement of facts and law would serve the interests of all concerned. Accordingly, we recommend that a record similar to that required under Rule 238(2) should be filed on a motion for certification, whether the action brought as a class action is commenced in the High Court or in a county or district court.[25] We further recommend that the parties should be required to file a statement of facts and law reasonably in advance of the certification motion.[26]

4. THE CERTIFICATION ORDER

At the conclusion of the certification hearing, the presiding judge will be required to decide whether to allow the action in question to be maintained in class form. In this section, we shall discuss what the judge should do if he is satisfied that the prerequisites for certification in the proposed *Class Actions Act* have been satisfied, as well as the options available to him if the requirements for certification have not been met. We turn first to consider the possible responses of the judge in a case where one or more of the conditions for certification have not been established.

(a) Certification Denied

Under the present law, if a court concludes that an action brought pursuant to Rule 75 of the Supreme Court of Ontario Rules of Practice does not comply with the terms thereof, it may dismiss the action[27] or simply strike out all reference in the writ of summons and the pleadings to the class aspects of the action and permit the putative representative plaintiff to continue with the action in his personal capacity.[28] In the majority of cases where the requirements for a class action under Rule 75 have not been met, the court has chosen the latter course of action, despite the absence of any express provision to this effect. The only circumstance in which it would seem appropriate to dismiss the action, and not to permit the plaintiff to continue with his own action against the defendant, is where the court has concluded that the plaintiff's claim shows no reasonable cause of action or is frivolous or vexatious pursuant to present Rule 126.

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[25] The courts in which a class action may be brought are discussed *infra*, ch. 11, sec. 4(a).

[26] These recommendations could be implemented by means of rules made by the Rules Committee: see Draft Bill, s. 53.

[27] For example, if the court concludes that the class action discloses no reasonable cause of action, it may order that the action be dismissed under r. 126 of the Supreme Court of Ontario Rules of Practice, *supra*, note 2. The use to which r. 126 may be put in the class action context is discussed *supra*, ch. 7, sec. 2.

[28] See, for example, *Stephenson v. Air Canada*, unreported (February 10, 1981, Ont. C.A.), aff'g (1979), 26 O.R. (2d) 369, 103 D.L.R. (3d) 148 (H.C.J.).

Unlike Rule 75, Rule 23 of the United States Federal Rules of Civil Procedure specifically authorizes a court to make an order "requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly".[29] The American Uniform Class Actions Act states expressly that "[r]efusal of certification does not terminate the action, but does preclude it from being maintained as a class action".[30]

In the Commonwealth, there are precedents for a provision similar to that found in Rule 23. For example, under the recently enacted class action provisions of the Quebec *Code of Civil Procedure*,[31] where "the court annuls the judgment authorizing the bringing of the class action, the suit continues between the parties in accordance with the ordinary rules".[32] Both the Draft Bill for a Class Actions Act appended to the report on class actions of the Law Reform Committee of South Australia,[33] and the Model Consumer Class Actions Act proposed by Professor Williams,[34] contain a provision that is very similar in language. Section 3(6) of the South Australia Draft Bill provides as follows:

> 3.-(6) If the plaintiff does not apply to the Court as provided by subsection (2) or if on such application the Court determines that the action is not to be maintained as a class action the Court shall make all such amendments to the proceedings as will eliminate therefrom all reference to representation of absent persons and may make such other consequential orders as may be just and expedient.

Professor Williams' proposal states simply that, "[i]f ... the court determines that the action is not to be maintained as a class action, the court *shall* make all such amendments to the proceedings as will eliminate therefrom all reference to representation of absent persons".[35]

It would appear that the legislative trend is clearly in favour of an explicit direction to the court to permit the representative plaintiff to proceed with his claim against the defendant where the court refuses to certify an action as a class action, and we too favour the inclusion in the proposed *Class Actions Act* of such a provision for a simple reason. While, as we have indicated, the courts have had little difficulty under the present law in deciding that the representative plaintiff should be allowed to proceed in his personal capacity

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[29] Fed. R. Civ. P. 23(d)(4).

[30] U.C.A.A., *supra*, note 4, §4(d).

[31] R.S.Q. 1977, c. C-25, arts. 999-1051, as enacted by S.Q. 1978, c. 8, s. 3 (hereinafter referred to as "C.C.P.").

[32] *Ibid.*, art. 1026.

[33] South Australia Draft Bill, *supra*, note 8.

[34] Williams, "Model Consumer Class Actions Act", in "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 65 (hereinafter referred to as "Williams' Model Act").

[35] *Ibid.*, s. 3(5) (emphasis added).

against the defendant where the class action contravenes Rule 75, we believe it advisable to provide in the proposed *Class Actions Act* a comprehensive code for the commencement and maintenance of class actions. In our view, there is little to be gained from leaving gaps in the proposed legislation that can be filled only by reliance on the existing case law. Therefore, the Commission recommends that, where a court denies certification, it should be empowered to order that the style of cause and the pleadings be amended to eliminate any allegation as to the representation of class members, and to permit the action to proceed accordingly.[36]

(b) Amendment of Proceedings

On a number of occasions, courts have also exercised their broad powers of amendment to cure a deficiency in an action brought in class form. A good example of the exercise of this power to enable a class action to satisfy the requirements of Rule 75 is *Naken v. General Motors of Canada Ltd.*[37] In that case, an action was brought on behalf of all persons who had purchased new 1971 and 1972 Firenza motor vehicles, and who at the date of the writ had not sold or otherwise disposed of the vehicles. It was alleged that, because of a breach of warranty, each of the class members had suffered $1,000 damages, being the reduction in the resale value of each vehicle. Warranties relied on by the representative plaintiffs consisted of certain implied warranties and a collateral warranty alleged to have been made by the defendant to each of the purchasers of the vehicles in question. It was conceded by counsel for the representative plaintiffs that the class, as originally described, was too broad, and counsel indicated that he was prepared to abandon reliance on any implied warranties. The Court permitted the class definition to be amended to make clear that the action was brought on behalf of only those purchasers who had relied on the defendant's alleged collateral warranty. Without such an amendment, it is clear that the action would not have been allowed to proceed as a class action; those members whose claims were based on breach of an implied warranty did not have the "same interest" in the litigation as the members of the class whose claim was founded on a breach by the defendant of a collateral warranty relied on by them in purchasing their vehicles.

We believe that, under the proposed *Class Actions Act*, the courts should have a similar discretion. As indicated, in chapter 11 we shall propose that the court should have broad powers regarding the conduct of actions brought in class form. Undoubtedly, the court, in the exercise of these broad powers, could permit the proceedings to be amended to enable an action to meet the proposed certification tests. Accordingly, we see no need for a specific provision empowering the courts to do so.

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[36] See Draft Bill, s. 10(1).

[37] (1978), 21 O.R. (2d) 780, 92 D.L.R. (3d) 100 (C.A.). See, also, *Cobbold v. Time Canada Ltd.* (1976), 13 O.R. (2d) 567, 71 D.L.R. (3d) 629 (H.C.J.), dismissed at trial (1980), 28 O.R. (2d) 326, 109 D.L.R. (3d) 611 (H.C.J.).

(c) Certification Granted

(i) Contents of a Certification Order

In this section, we are concerned with the contents of an order certifying a class action, that is to say, an order permitting the action to be maintained in the form of a class action. Since court authorization of the bringing of a class action is not required under the existing Ontario class action Rule, the present law offers us no guidance on this issue. The contents of an order permitting an action to be maintained in class form, however, has been the subject of legislation or proposed legislation in other jurisdictions and, consequently, it is to these other jurisdictions that we must look for a precedent.

While Rule 23 of the United States Federal Rules of Civil Procedure prescribes, in subdivision (c)(3), the contents of a judgment in an action maintained as a class action,[38] it does not deal with the contents of the order permitting the action to be maintained in class form. Significantly, those jurisdictions that have seen fit to prescribe the contents of the order permitting the action to be maintained as a class action, for the most part, have duplicated the requirements set out in Rule 23(c)(3).

Turning to the American precedents on the issue of the contents of a certification order, section 903 of the New York Civil Practice Law and Rules, for example, provides simply that "[t]he order permitting a class action shall describe the class. When appropriate the court may limit the class to those members who do not request exclusion from the class within a specified time after notice". The class action mechanism recently introduced in Illinois provides even less guidance than the New York provision.[39]

More detailed provisions respecting the contents of a certification order

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[38] Fed. R. Civ. P. 23(c)(3) provides as follows:

> 23(c)(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

[39] Illinois Civil Practice Act, *supra*, note 4, §57.3 provides as follows:

> 57.3(a) Determination of Class. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it may be so maintained and describe those whom the court finds to be members of the class. This order may be conditional and may be amended before a decision on the merits.
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> (b) Class Action on Limited Issues and Sub-classes. When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or divided into sub-classes and each sub-class treated as a class. The provisions of this rule shall then be construed and applied accordingly.

can be found in Bill H.R. 5103,[40] proposed by the Office for Improvements in the Administration of Justice of the United States Department of Justice. Section 3022(d) of this Bill provided in part as follows:

> 3022(d) If the action is not dismissed as a public or class compensatory action, the court shall enter an order describing the scope of the action, including a description of the transaction giving rise to the action and a statement of the substantial question of law or fact common to all injured persons. Such order shall be conditional and may be altered or amended before judgment is entered.

Undoubtedly, the most detailed provisions in this regard are to be found in legislation recently enacted or proposed in this country. The Bills[41] introduced in the latter half of the last decade to amend the *Combines Investigation Act*[42] each contained the following provision:

> 39.12(5) An order that proceedings be maintained as a class action shall
>
> (*a*) define the class on whose behalf the action is to be maintained;
>
> (*b*) describe briefly the nature of the claim made and of the relief sought;
>
> (*c*) set forth the questions of law or fact that appear to be common to the causes of action of members of the class; and
>
> (*d*) specify a date before which members of the class may give notice to the Court of their wish to be excluded from the class action.

Reference also should be made to article 1005 of the Quebec *Code of Civil Procedure*,[43] prescribing the contents of a judgment granting the motion seeking the authorization of the court to institute a class action. Article 1005 reads as follows:

> 1005. The judgment granting the motion:
>
> (*a*) describes the group whose members will be bound by any judgment;
>
> (*b*) identifies the principal questions to be dealt with collectively and the related conclusions sought;
>
> (*c*) orders the publication of a notice to the members.
>
> The judgment also determines the date after which a member can no longer request his exclusion from the group; the delay for exclusion cannot be less than thirty days nor more than six months after the date of the notice to the members. Such delay is peremptory; the court may nevertheless permit the exclusion of a member who shows that in fact it was impossible for him to act sooner.

The Commission has concluded that specifying the contents of the

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[40] O.I.A.J. Bill H.R. 5103, *supra*, note 9. See, also, U.C.A.A., *supra*, note 4, §4.

[41] Bill C-42 and Bill C-13, *supra*, note 4. See, also, Williams' Model Act, *supra*, note 34, s. 3(6).

[42] R.S.C. 1970, c. C-23, as amended.

[43] C.C.P., *supra*, note 31.

certification order will serve a number of useful functions. First, in conjunction with the pleadings, the certification order will help set the limits of the common questions aspect of the class proceedings. In particular, the certification order can perform a *res judicata* function. In chapter 18 of this Report, we shall recommend that, in order to preclude the application of the rule against splitting,[44] the judgment on the questions common to the class should be binding only to the extent that the judgment determines the questions common to the class that are defined in the certification order and that relate to the claim described and the relief specified in that order.[45] Secondly, where the court permits some or all of the class members in a particular class action to opt out,[46] the certification order will serve an informational purpose: only after determining the nature and scope of the class action brought on their behalf will members of the class be able to make an informed and intelligent decision regarding the exercise of their right to opt out. Finally, should the decision of the court granting certification be appealed,[47] a certification order in the form prescribed will be of assistance to the appellate court in reviewing the decision of the judge presiding at the certification hearing.

For the above reasons, the Commission recommends[48] that a certification order should (1) describe the class on whose behalf the action is brought; (2) describe the nature of the claim made on behalf of members of the class and specify the relief claimed; and (3) define the questions of law or fact common to the class. Moreover, where the court has determined that some or all of the members of the class should have the right to exclude themselves from the litigation, the certification order should make reference to this decision and should specify the date before which the class members may exclude themeselves.

(ii) Amendment of a Certification Order and Decertification

In this section, we shall consider the powers that a court should possess where, following certification, it becomes clear that there has been a change in the circumstances on the basis of which the certification order was granted. We shall first examine the need for an amendment power and then proceed to discuss whether the court, in appropriate circumstances, should be able to "decertify" a class action.

As a result of additional information that comes to light, it may become apparent, for example, that the class on whose behalf the action is being brought must be redefined, or that the questions of fact or law to be determined in class form should be altered. We see no reason why a

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[44] For a discussion of the rule against splitting, see *infra*, ch. 18, sec. 2(a).

[45] See *infra*, ch. 18, sec. 4.

[46] For a discussion of the "right" of a class member to exclude himself from a class action, see *infra*, ch. 12.

[47] For a discussion of the subject of appeals, see *infra*, ch. 21.

[48] See Draft Bill, s. 9(1).

certification order should not be subject to amendment in these and similar circumstances.

The class action provisions in a great many of the jurisdictions that we have examined expressly empower the courts to make any necessary amendments to the order authorizing the maintenance of an action as a class action. For example, Rule 23(c)(1) of the United States Federal Rules of Civil Procedure states that an order permitting an action to be continued in class form "may be altered or amended before the decision on the merits". A more comprehensive amendment provision is to be found in the American Uniform Class Actions Act,[49] section 5 of which provides as follows:

> 5(a) The court may amend the certification order at any time before entry of judgment on the merits. The amendment may (1) establish subclasses, (2) eliminate from the class any class member who was included in the class as certified, (3) provide for an adjudication limited to certain claims or issues, (4) change the relief sought, or (5) make any other appropriate change in the order.
>
> (b) If notice of certification has been given pursuant to Section 7, the court may order notice of the amendment of the certification order to be given in terms and to any members of the class the court directs.
>
> (c) The reasons for the court's ruling shall be set forth in the amendment of the certification order.
>
> (d) An order amending the certification order is appealable. An order denying the motion of a member of a defendant class, not a representative party, to amend the certification order is appealable if the court certifies it for immediate appeal.

The Commonwealth provisions that we have examined are not nearly so detailed as section 5 of the Uniform Class Actions Act. The South Australia Draft Bill for a Class Actions Act simply states that "[a]n order that the action be maintained as a class action and any provision thereof may be varied upon the application of any party thereto at any time before judgment in the action".[50] Similarly, article 1022 of the Quebec *Code of Civil Procedure*[51] empowers the court, in certain circumstances, "to amend the judgment authorizing the bringing of the class action . . . or allow the representative to amend the conclusions sought".

Again, to ensure that the proposed *Class Actions Act* is a comprehensive code for the bringing and maintenance of class actions, we recommend that the Act contain a provision that expressly authorizes the court to amend a certification order at any stage of a class action.[52] The matters of notice and appealability of such an amending order – matters dealt with in section 5 of the Uniform Class Actions Act – will be examined in later chapters of this Report.[53]

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[49] U.C.A.A., *supra*, note 4.

[50] South Australia Draft Bill, *supra*, note 8, s. 3(9).

[51] C.C.P., *supra*, note 31.

[52] See Draft Bill, s. 9(2).

[53] In the case of notice, see *infra*, ch. 13, sec. 4(c), dealing with the power of the court to order general notice. Insofar as the appealability of an amending order is concerned, see *infra*, ch. 21, sec. 2(d).

In addition to the power to amend a certification order, the Commission is of the view that the court should have the power to decertify the action. A few examples may help to illustrate the circumstances in which such a power might be useful. Despite a finding at the certification hearing that the class on whose behalf the action is brought is numerous, circumstances may be such that the size of the class, with the passage of time, diminishes significantly. The number of members who decide to opt out of the litigation, for example, may be greater than anticipated. Alternatively, the defendant may have satisfied the claims of a sizable number of the class members, with the result that the class is no longer sufficiently numerous, or that the class action proceedings can no longer be said to be superior to other forms of litigation.

Another situation that may justify decertification of a class action is the securing of evidence during discovery that, in fact, there are no common questions of fact or law that will be determined by the action. Since the presence of such common questions is a prerequisite to certification, a determination that the action will not dispose of questions of fact or law common to the class should put an end to the class proceedings.

Finally, although the court may have found at the certification hearing that the representative plaintiff will fairly and adequately protect the interests of the members of the class, his conduct or the conduct of his counsel during the course of the proceedings may make it apparent that the adequacy of representation requirement is no longer satisfied. If no substitute representative plaintiff comes forward to assume carriage of the class action,[54] again, it would seem reasonable to decertify the class action.

A number of the class action precedents that we have examined expressly authorize the court to decertify a class action, including the Quebec *Code of Civil Procedure*[55] and the South Australia Draft Bill for a Class Actions Act.[56] We too believe that a provision dealing with the question of decertification is necessary. The Commission, therefore, recommends that the proposed *Class Actions Act* should provide that, where it appears to the court that the action no longer satisfies the prerequisites for certification, the court should set aside the order certifying the action as a class action.[57]

(d) Conditional Certification

One last matter to which we wish to address our attention in this section is the use of a "conditional certification order", a matter that we discussed

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[54] For a discussion of the subject of adequacy of representation and substitution, see *supra*, ch. 8, sec. 4(c)(iv).

[55] C.C.P., *supra*, note 31, art. 1022.

[56] South Australia Draft Bill, *supra*, note 8, s. 3(10). See, also, Fed. R. Civ. P. 23(d)(4) and (5), and N.Y. Civ. Prac. Law §907. See Wright and Miller, *supra*, note 5, Vol. 7A, §1795, at 215.

[57] See Draft Bill, s. 10(2).

briefly in chapter 9.[58] Express provision for such an order is to be found in Rule 23(c)(1) of the United States Federal Rules of Civil Procedure, and a similar provision is contained in most of the American class action legislation and proposals that we have examined.[59] By contrast, conditional certification seems to be a concept that has not found its way into legislation or proposals for reform either in Canada or in Australia.

Conditional certification is a device that allows a court to certify an action where it has some doubts about whether the action should proceed as a class action, but is content that it proceed in that form so long as certain conditions are fulfilled at later stages of the proceedings.[60] Conditional certification should be distinguished from decertification, which allows a court to withdraw class status from an action that it has certified because certain factors have come to light that render it inappropriate that the action continue as a class action. However, in the case of decertification – and this is the important difference between the two – the court was satisfied at the time of certification that the suit should have been certified.

It would appear that conditional certification is used most frequently in the United States in cases where manageability problems are thought likely to arise.[61] For example, it may be anticipated that notice to the members of the class will be a problem at a later stage in the action, but be unclear at the certification stage whether this will be the case. Similarly, it may be uncertain whether difficulties in the assessment and distribution of any monetary relief secured by the action are likely to develop. A conditional certification order, then, is a means of buying time to work out anticipated management difficulties or to obtain information concerning whether they are likely to arise.

The Commission sees no need for empowering the courts to grant conditional certification under the proposed *Class Actions Act*. Given the recommendations we shall make regarding notice[62] and the assessment and distribution of monetary relief,[63] the Commission is of the view that many of the manageability problems with which courts in the United States have been

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[58] See *supra*, ch. 9, sec. 2(a)(iv)e.

[59] See, for example, Illinois Civil Practice Act, *supra*, note 4, and Proposed A.B.A. Legislation, *supra*, note 9.

[60] For a general discussion of the judicial attitudes towards conditional certification, see Newberg, *supra*, note 19, Vol. 3, §2420b, at 77.

[61] Conditional certification was approved in the following cases: *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y. 1971); *Brennan v. Midwestern United Life Insurance Co.*, 259 F. Supp. 673 (N.D. Ind. 1966); *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322 (E.D. Pa. 1976); *Link v. Mercedes-Benz of North America, Inc.*, 550 F.2d 860 (3d Cir. 1977); and *Neely v. United States*, 546 F.2d 1059 (3d Cir. 1976). Compare *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968); *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974); and *In re Transit Company Tire Antitrust Litigation*, 67 F.R.D. 59 (W.D. Mo. 1975).

[62] See *infra*, ch. 13.

[63] See *infra*, ch. 14, sec. 3.

concerned are unlikely to arise in Ontario. Moreover, it will be recalled that, earlier in this chapter, we recommended the mandatory filing of affidavits by the representative plaintiff and the defendant at the certification stage in order to provide the courts with the fullest information possible.[64] In the light of this recommendation, it seems difficult to justify resort to conditional certification in order to enable the parties to cure any informational deficiencies that exist at the time of the certification hearing. Accordingly, we recommend that Ontario courts should not be authorized to issue a conditional certification order.

Recommendations

The Commission makes the following recommendations:

1. An application for the certification of a class action should be commenced within ninety days from the day upon which the defendant files his appearance, or within ninety days from his default in so doing.

2. For the purposes of a certification motion, both the representative plaintiff and the defendant should be required to file one or more affidavits setting out the facts material to the proposed certification tests upon which they intend to rely, and they should be permitted to examine the deponents of any such affidavits.

3. A record similar to that mandatory under Rule 238(2) of the Supreme Court of Ontario Rules of Practice should be required to be filed on a motion for certification, whether the action is brought as a class action in the High Court or in a county or district court. The parties should also be required to file a statement of facts and law reasonably in advance of the certification motion.

4. Where the court refuses to certify a class action, it should be empowered to order that the style of cause and the pleadings be amended to eliminate any reference as to the representation of class members, and to permit the action to proceed accordingly.

5. The court, in the exercise of the broad management powers to be recommended in chapter 11, should have a discretion to permit all necessary amendments to enable an action to meet the proposed certification prerequisites.

6. A certification order should (a) describe the class on whose behalf the action is brought; (b) describe the nature of the claim made on behalf of members of the class and specify the relief claimed; and (c) define the questions of law or fact common to the class. Where the court has determined that some or all of the members of the class should have the right to exclude themselves from the litigation, the certification order should make reference to this decision and should specify the date before which the class members may exclude themselves.

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[64] See *supra*, this ch., sec. 2.

7. Courts should be authorized expressly by the proposed *Class Actions Act* to amend a certification order at any stage of a class action.

8. The proposed *Class Actions Act* should provide that, where it appears to the court that an action no longer satisfies the prerequisites for certification, the court should set aside the order certifying the action as a class action.

9. Courts should not be authorized under the proposed *Class Actions Act* to issue a conditional certification order.

CHAPTER 11

THE CONDUCT OF CLASS ACTIONS

1. INTRODUCTION

Earlier in this Report,[1] we outlined briefly the three main stages of our proposed class action procedure. The first stage of this procedure – judicial certification of an action as appropriate for class treatment – was the subject of the immediately preceding chapters.[2] The second stage of a class action follows certification, and has to do with the resolution of questions common to members of the class. Often, however, resolution of the common questions in favour of the class will not dispose of the litigation. In such cases, subsequent proceedings – the third stage of a class action – will be necessary to determine questions affecting individual members of the class.

The focus of this chapter is the conduct or management of a class action at all stages of the action. Because class litigation is, typically, complex, and because the rights of persons who are not before the court will be affected by the outcome of the litigation, it is clear that class actions must be managed fairly and efficiently if judicial economy and access to justice – the main objectives of our revised class action procedure[3] – are to be achieved.

In this chapter, we shall examine the role of the court in the conduct of class litigation, and shall propose that judges be given broad powers designed to facilitate management of complex class actions and protection of class members' interests. We shall also discuss what court or courts should have jurisdiction to hear class actions, and who should preside at the various stages of a class action. Before turning to these matters, however, we wish to consider whether the proposed *Class Actions Act* should contain a provision specifically authorizing separate proceedings for the resolution of questions affecting individual class members following a determination of the common questions in favour of the class.

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[1] See *supra*, ch. 6, sec. 1(b)(vi).

[2] In chs. 7, 8, and 9, we discussed the prerequisites to the certification of an action as a class action. In ch. 10, we examined the certification hearing.

[3] See *supra*, ch. 4, sec. 3.

2. COMMON QUESTIONS AND INDIVIDUAL QUESTIONS

As discussed in some detail earlier in this Report, Ontario courts, generally speaking, have been unwilling to countenance class actions where separate proceedings, following trial, are necessary to resolve questions affecting individual class members. This restrictive approach to the maintenance of class actions is based primarily upon the "same interest" requirement of Rule 75, which has been interpreted by the courts as requiring a virtual identity of interest among class members.[4] Although there is some evidence that courts are taking a more liberal approach to the "same interest" requirement,[5] it nevertheless remains the law of Ontario that a class action requiring individual assessment of damages in proceedings involving the defendant cannot be maintained. Apart from the strictures of the "same interest" requirement, the courts, in refusing to permit class actions involving separate proceedings, have expressed concern that, because the present class action Rule contains no provision for subjecting individual class members to discovery or liability for costs, it would be unfair to defendants to permit class actions involving individual issues to proceed: it is feared that a defendant would be unable to challenge class members with respect to individual issues and could not recover costs against unsuccessful claimants.[6]

In the view of the Commission, fear of bifurcated proceedings in the class action context is unfounded. Assuming that procedures can be developed for the fair and efficient disposition of individual issues, so that the rights and interests of both the defendant and the class members can be protected adequately, we can see no reason why the mere presence of individual issues, necessitating individual proceedings following the resolution of the common questions, should be a bar to a class action.

It will be recalled that, in considering the prerequisites to certification, the Commission recommended that the "same interest" prerequisite should be replaced in the proposed *Class Actions Act* by a simple common questions test.[7] Our purpose in so recommending was to enable the courts to certify an action involving individual, as well as common, questions, where the action is otherwise appropriate for class treatment.[8] In subsequent chapters, we shall make recommendations concerning the conduct of individual proceedings and the right of defendants to obtain discovery and costs in respect of

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[4] See discussion *supra*, ch. 2, sec. 2(c)(i) and (ii), and ch. 8, sec. 3(a).

[5] *Ibid.* In addition, where the relief sought can be established by common evidence and the participation of the defendant is not required in subsequent proceedings to determine the amount of each class member's entitlement, the prospect of this type of "split trial" has not deterred courts from permitting the action to proceed: see, for example, *Farnham v. Fingold*, [1973] 2 O.R. 132, 33 D.L.R. (3d) 156 (C.A.) (subsequent references are to [1973] 2 O.R.), and *Shaw v. Real Estate Board of Greater Vancouver* (1973), 36 D.L.R. (3d) 250, [1973] 4 W.W.R. 391 (B.C.C.A.), dismissed at trial [1974] 5 W.W.R. 193 (B.C.S.C.). See, also, *Alberta Pork Producers Marketing Board v. Swift Canadian Co. Ltd.* (1981), 16 Alta. L.R. (2d) 313.

[6] See, for example, *Farnham v. Fingold*, *supra*, note 5, at 136.

[7] See *supra*, ch. 8, sec. 3(c)(v).

[8] *Ibid.*

individual issues.[9] However, while these recommendations are intended to overcome the obstacles to bifurcated proceedings under the existing law, the question remains whether the proposed *Class Actions Act* should explicitly authorize separate proceedings for the determination of questions that are individual to members of the class.

In the federal courts in the United States, individual proceedings arising out of a class action would seem to be authorized explicitly by subdivision (c)(4) of Rule 23, which states that "an action may be brought or maintained as a class action with respect to particular issues".[10] Bifurcation, or a "split trial", in the context of class actions, however, has not met with universal approval.[11] Indeed, some courts have been most reluctant to permit separate trials – that is to say, trial of the common questions followed by trials of any individual issues. For example, the Court in *State of Alabama v. Blue Bird Body Co., Inc.*[12] and the Court in *Windham v. American Brands, Inc.*[13] each held that bifurcation of class proceedings should be resorted to with "trepidation" and "extreme caution".

It should be noted that split trials were opposed in *State of Alabama v. Blue Bird Body Co., Inc.* and *Windham v. American Brands, Inc.* – both antitrust cases – because of the nature of the cause of action. Where individual questions are inextricably interwoven with common questions, it is argued that assignment of these questions to different juries for adjudication would be a violation of the right to trial by jury guaranteed by the Seventh Amendment of the Constitution of the United States.[14] No similar constitutional restriction exists in Ontario. Bifurcation has also been rejected in some antitrust cases because of the administrative difficulties that would be encountered by proceeding in this manner.[15] The reluctance of some Ameri-

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[9] See *infra*, chs. 15, 16, and 17, dealing with individual proceedings, discovery, and costs, respectively.

[10] Fed. R. Civ. P. 23, promulgated at 383 U.S. 1029 (1966). See Newberg, *Newberg on Class Actions* (1977), Vol. 3, §4640, at 92-94. Compare Berry, "Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action" (1980), 80 Colum. L. Rev. 299, at 315-16.

[11] See, for example, Simon, "Class Actions - Useful Tool or Engine of Destruction", 55 F.R.D. 375 (1973), at 382-83. See, also, American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure* (1972), at 8-10.

[12] 573 F.2d 309 (5th Cir. 1978).

[13] 565 F.2d 59 (4th Cir. 1977), *cert.* denied 435 U.S. 968 (1978).

[14] The Seventh Amendment provides in part as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

See Newberg, *supra*, note 10, Vol. 3, §4640, at 93-94.

[15] See, for example, *In re Transit Company Tire Antitrust Litigation*, 67 F.R.D. 59 (W.D. Mo. 1975), and *Veizaga v. National Board for Respiratory Therapy*, 1979-1 Trade Cases

can courts to order "split trials" in the antitrust context may be contrasted with their apparent willingness to make such an order in other areas. For instance, both in securities cases[16] and in employment discrimination class actions,[17] the courts, almost unquestioningly, have permitted bifurcation.

Many of the American class action precedents that we have examined contain a provision similar to subdivision (c)(4) of Rule 23 and, consequently, would seem to permit "split trials".[18] Of greater interest is the fact that some recent proposals for the reform of class actions in the United States have dealt expressly with the propriety of this course of action. For example, section 3026(b) of Bill H.R. 5103, put forward by the Office for Improvements in the Administration of Justice of the United States Department of Justice,[19] provided as follows:

> 3026(b) To the extent permitted by the Constitution, the district court shall first try issues relating to liability or violation, before trying issues relating to damages, unless the party opposing such trials demonstrates to the court that they will not expedite final resolution of the action.

A similar provision is to be found in the class action legislation under consideration by a committee of the Section of Litigation of the American Bar Association.[20] These proposals make it clear that the reluctance to resort to split trials is, for the most part, constitutionally based.

In Canada, both the proposal advanced by Professor Williams in his

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¶62,497 (N.D. Ill. 1979). Compare, however, *In re Plywood Anti-trust Litigation*, 76 F.R.D. 570 (E.D. La. 1976); *In re Folding Carton Antitrust Litigation*, 75 F.R.D. 727 (N.D. Ill. 1977); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975); *City of New York v. General Motors Corp.*, 60 F.R.D. 393 (S.D.N.Y. 1973); and *Halverson v. Convenient Food Mart, Inc.*, 69 F.R.D. 331 (N.D. Ill. 1974), where the use of split trials was clearly contemplated.

[16] See, for example, *Sharp v. Coopers & Lybrand*, 70 F.R.D. 544 (E.D. Pa. 1976); *Spector v. City of New York*, 71 F.R.D. 550 (S.D.N.Y. 1976); *Schnorbach v. Fuqua*, 70 F.R.D. 424 (S.D. Ga. 1975); *Hurwitz v. R.B. Jones Corp.*, 76 F.R.D. 149 (W.D. Mo. 1977); *Metge v. Baehler*, 77 F.R.D. 470 (S.D. Ia. 1978); and *Seiden v. Nicholson*, 69 F.R.D. 681 (N.D. Ill. 1976).

[17] See, for example, *Vanguard Justice Society v. Hughes*, 19 FEP Cases 587 (D. Md. 1979); *McLendon v. Continental Trailways, Inc.*, 18 FEP Cases 1698 (N.D. Tex. 1978); *Stastny v. Southern Bell Telephone and Telegraph Co.*, 458 F. Supp. 314 (W.D. N.C. 1978); and *Neloms v. Southwestern Electric Power Co.*, 440 F. Supp. 1353 (W.D. La. 1977).

[18] See, for example, Illinois Civil Practice Act, Ill. Ann. Stat. ch. 110, §57.3(b) (Smith-Hurd 1981 Supp.); N.Y. Civ. Prac. Law §906 (McKinney); and National Conference of Commissioners on Uniform State Laws, Uniform Class Actions Act, Uniform Laws Ann. (1975), Vol. 12 (Cum. Supp. 1981), at 20, §2(c) (hereinafter referred to as "U.C.A.A.").

[19] Small Business Judicial Access Act of 1979, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill H.R. 5103, 96th Cong., 1st Sess. (1979) (hereinafter referred to as "O.I.A.J. Bill H.R. 5103").

[20] See American Bar Association, Section of Litigation, *Proposed Class Action Legislation* (tentative draft, May 1980), §3008(b) (hereinafter referred to as "Proposed A.B.A. Legislation").

Model Consumer Class Actions Act[21] and the class action procedure set forth in Bills C-42[22] and C-13[23] contain provisions relating to the determination of individual issues in proceedings subsequent to judgment on the common questions. The Draft Bill for a Class Actions Act recommended by the Law Reform Committee of South Australia[24] contains provisions similar to those proposed by Professor Williams.

In Quebec, the recently enacted class action provisions of the *Code of Civil Procedure*[25] clearly envisage the bifurcation of class proceedings. For example, article 999(b) defines "final judgment" to mean "the judgment which decides the questions of law or fact dealt with collectively". It is further provided, in article 1028, that every final judgment for monetary relief must order that the claims of the class members either be recovered collectively[26] or "be the object of individual claims". Articles 1035 to 1040 prescribe briefly the procedure to be used for the adjudication of individual claims.

The Commission is of the view that, in order to make it absolutely clear that the court may order separate proceedings to resolve individual issues, bifurcation of class action proceedings should be authorized explicitly by the proposed *Class Actions Act*. Accordingly, we recommend that the Act should contain an express provision authorizing the determination of common questions in common proceedings, and the resolution in individual proceedings of questions that require the participation of individual members of the class.[27]

One point should be emphasized, however. Not every action in which individual questions are present will be appropriate for bifurcation. Rather,

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[21] See Williams, "Model Consumer Class Actions Act", in "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 65, s. 9 (hereinafter referred to as "Williams' Model Act").

[22] *An Act to Amend the Combines Investigation Act*, Bill C-42, 1977 (30th Parl. 2d Sess.) (hereinafter referred to as "Bill C-42"). Bill C-42 provided, in s. 39.13(2), that the procedures governing individual proceedings should be prescribed by regulation. See, also, Bill C-42, ss. 39.13(2), 39.21, and 39.22(1)(*d*).

[23] *An Act to Amend the Combines Investigation Act*, Bill C-13, 1977 (30th Parl. 3d Sess.) (hereinafter referred to as "Bill C-13"). The provisions in the Bill governing individual proceedings are similar to those contained in Bill C-42, *supra*, note 22: see Bill C-13, ss. 39.13(2), 39.19, and 39.2(1)(*d*).

[24] See Law Reform Committee of South Australia, "Draft Bill for a Class Actions Act", in *Thirty-sixth Report Relating to Class Actions* (1977), at 12, s. 9 (hereinafter referred to as "South Australia Draft Bill").

[25] See *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, arts. 999-1051, as enacted by S.Q. 1978, c. 8, s. 3 (hereinafter referred to as "C.C.P.").

[26] That is, by means of an aggregate assessment. For a discussion of this concept, see *infra*, ch. 14, sec. 3.

[27] See Draft Bill, s. 11(1). This provision is intended to permit the courts to determine in common proceedings common questions relating to both issues of liability and, where common evidence with respect thereto is available, damage issues.

every class action to which the proposed *Class Actions Act* applies will be required to meet the recommended certification prerequisites. In class actions in which individual questions must be resolved, the superiority prerequisite, and in particular the common questions predominance element of that prerequisite,[28] will be of particular relevance. Where common questions do not predominate, this factor can be taken into account in determining whether a class action is the superior method of disposing of the litigation.

3. MANAGEMENT OF CLASS ACTIONS

(a) Role of the Court

The traditional model of litigation in the Canadian and Anglo-American context may be described as a triangle – with a judge at the apex of the triangle and opposing parties at the base, each side arguing discrete and limited issues.[29] While, unquestionably, rules relating to joinder of parties and claims, counterclaims, and third party proceedings have served to expand the scope of some litigation to a degree, this expansion has been confined to a limited range of parties and issues.[30]

According to the traditional view of litigation, the trial judge is perceived as an impartial arbiter between the parties. The judge is passive and is expected only to react to the actions of the parties; the parties initiate, prosecute, and settle the action as they see fit, with little interference from the court.[31] It has been suggested that this model of litigation reflects the values inherent in nineteenth century society, which placed much store in individual autonomy.[32]

It is becoming increasingly apparent that some forms of litigation, and particularly complex litigation,[33] do not conform to the traditional model.

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[28] See discussion *supra*, ch. 9, sec. 3(b)(ii)a., and Draft Bill, s. 4(*a*).

[29] See Chayes, "The Role of the Judge in Public Law Litigation" (1976), 89 Harv. L. Rev. 1281.

[30] See, for example, a discussion of this point in respect of third party claims in Halfnight, "Third Party Procedure: Some Problems of Purpose and Scope", in Gertner (ed.), *Studies in Civil Procedure* (1979) 87.

[31] See Brooks, "The Judge and the Adversary System", in Linden (ed.), *The Canadian Judiciary* (1976) 89, at 93.

[32] See Chayes, *supra*, note 29, at 1285.

[33] For example, commercial litigation and "standing" cases. Some complex commercial litigation, because of the nature of the issues raised and the number of documents relevant to the dispute, will deviate only slightly from the traditional model of litigation. Other kinds of complex litigation, such as derivative actions under section 97 of the *Business Corporations Act*, R.S.O. 1980, c. 54, and "standing" cases, will differ substantially from traditional litigation, if for no other reason than the fact that the interests of persons not before the court will be determined by such proceedings.

For a discussion of the problems inherent in "standing" cases, see Law Reform Commission of British Columbia, *Report on Civil Litigation in the Public Interest* (1980). The Ontario Law Reform Commission is at present also studying the law of standing.

Without doubt, class actions constitute a major departure from this model. For example, the right asserted in a class action is based upon a mass wrong; permission to proceed in class form must be obtained from the court; the court is asked to dispose of the rights of persons who are not before the court and whose interests may not necessarily coincide in all respects; and monetary relief must be assessed and distributed to large numbers of persons. Indeed, one commentator has remarked as follows:[34]

> Whatever the resolution of the current controversies surrounding class actions, I think it unlikely that the class action will ever be taught to behave in accordance with the precepts of the traditional model of adjudication. The class suit is a reflection of our growing awareness that a host of important public and private interactions – perhaps the most important in defining the conditions and opportunities of life for most people – are conducted on a routine or bureaucratized basis and can no longer be visualized as bilateral transactions between private individuals. From another angle, the class action responds to the proliferation of more or less well-organized groups in our society and the tendency to perceive interests as group interests, at least in very important aspects.

With the recognition that some types of action do not conform to the traditional model of litigation, questions have arisen about the role of the trial judge as passive arbiter.[35] For example, is the passivity of the judge necessary to preserve impartiality? Does passivity allow the litigation to develop, both before and at trial, in a manner that imposes burdens upon the courts and that perhaps fails to serve even the more narrow interests of the parties?[36]

In the class action context, the notion of the judge as umpire poses special difficulties. As we have noted, a class action differs substantially from ordinary individual litigation in that the rights of individuals who are not before the court may be determined thereby. While the representative plaintiff is clearly obliged to protect the interests of absent class members, it does not seem inappropriate to suggest that the judge also has a duty to ensure that the interests of members of the class are, indeed, safeguarded,[37]

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[34] Chayes, *supra*, note 29, at 1291 (footnotes omitted). The growth of complex litigation, present and potential, in Canada is discussed, in a different context, in Wildsmith, "An American Enforcement Model of Civil Process in a Canadian Landscape" (1980), 6 Dalhousie L.J. 71.

[35] It has even been argued by some that the courts are not necessarily the institution best equipped to dispose of many kinds of dispute: see Arthurs, "Jonah and the Whale: The Appearance, Disappearance, and Reappearance of Administrative Law" (1980), 30 U. Toronto L.J. 225. See, also, Hugessen, "Are the Courts Cost-efficient?", in Canadian Institute for the Administration of Justice, *Cost of Justice* (1980) 47, at 52-53. Compare Chayes, *supra*, note 29, at 1307 *et seq.*

[36] The Honourable J. K. Hugessen, *supra*, note 35, at 54 *et seq.*, in focusing upon the cost and delay of litigation, addressed the problems attendant upon the judge remaining passive and permitting the parties to dominate the litigation. Associate Chief Justice Hugessen identified three problems in particular: the tradition of the courtroom drama, the myth of party prosecution, and the practice of ambush pleading.

[37] Note, "Developments in the Law – Class Actions" (1976), 89 Harv. L. Rev. 1318, at 1371-72 (hereinafter referred to as "Harvard Developments").

and that a class action that represents the only practical means of asserting small claims is not dismissed unnecessarily because of perceived management problems.

The "activist" role of the judge in ensuring that the rights of absent class members are protected is widely recognized.[38] The following remarks from the judgment of Judge Lord, in *In re Antibiotic Antitrust Actions*,[39] reflect this view:[40]

> Finally, the defendants argue that no class actions of this magnitude have ever been authorized by any other court . . . . It is obvious, however, that the only manner in which the plaintiff class can ever prosecute their claims is by a Rule 23 class action and the court cannot simply close its doors to these litigants because their actions present novel and difficult questions. Instead the court and the parties must use their ingenuity to conduct this litigation in a manner which will guarantee the rights of both sides. In a recent discussion of the challenges encountered by courts in facing the question of damages under Rule 23, Professor Benjamin Kaplan remarked that '[i]magination and even daring may be required of counsel and courts in devising abbreviated but fair procedures leading to hand-tailored relief which may well be quite novel in form.' . . . It is in this spirit which the court and parties must meet the future problems of this litigation.

In addition to the need to safeguard the interests of absent class members, the likely complexity of many class actions requires that the judge assume an active role in ensuring that such actions proceed expeditiously and efficiently. In the United States, this matter is discussed in the *Manual for Complex Litigation*.[41] The Manual, edited by a committee of judges in the Federal Judicial Center, contains a text together with recommended forms, orders, and rules for the purpose of suggesting both pre-trial and trial techniques for handling complex cases.[42] With respect to the role of the judge

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[38] Wright and Miller, *Federal Practice and Procedure* (1972), Vol. 7A, §1780, at 76; Kaplan, "A Prefatory Note" (1969), 10 B.C. Ind. & Com. L. Rev. 497, at 499-500; Federal Judicial Center, Board of Editors, *Manual for Complex Litigation* (1978) (Clark Boardman), §1.43, at 55-65 (hereinafter referred to as "Manual"); Harvard Developments, *supra*, note 37, at 1502-04; *In re Memorex Security Cases*, 61 F.R.D. 88 (N.D. Cal. 1973), at 103; *In re Motor Vehicle Air Pollution Control Equipment*, 52 F.R.D. 398 (C.D. Cal. 1970), at 404, rev'd on other grounds 481 F.2d 122 (9th Cir. 1973); *Yaffe v. Powers*, 454 F.2d 1362 (1st Cir. 1972); *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968), at 481-82; and *Neely v. United States*, 546 F.2d 1059 (3d Cir. 1976), at 1071.

[39] 333 F. Supp. 278 (S.D.N.Y. 1971).

[40] *Ibid.*, at 289 (footnote omitted).

[41] Manual, *supra*, note 38

[42] Newberg, *supra*, note 10, Vol. 3, §3025, at 5-6, describes the *Manual for Complex Litigation* as follows (footnote omitted):

> Most management decisions are based on the experience and ingenuity of the court and counsel participating in class action litigation. Actual experience in dealing with similar problems in other cases is often the best source of guidance in solving immediate problems in the particular suit. Other sources of assistance are also available. The most widely utilized publication for this purpose, in the federal courts, is the *Manual For Complex Litigation*, revised from time to time by a group of editors consisting of members of the federal judiciary. This Manual includes

in complex litigation, including class actions, the Manual states:[43]

> Both the bench and bar have long been in nearly unanimous agreement on the fundamental principle that a complex case must be managed by a judge with a firm hand . . . .
>
> The trial judge has the undoubted power and inescapable duty to control the processing of a case from the time it is filed. In the complex case, the judge must assume an active role in managing all steps of the proceedings. The control exercised must be fair as well as firm and must continue from the time of the filing of the complex case to its disposition. Under the adversary system, each advocate has a mission and a commitment to process and to present the case in the manner most favorable to his client, consistent with ethics and good faith. It is the mission and commitment of the judge only to ensure that justice results as speedily and economically as possible without regard to the special interest of any party. Opposing advocates, if left to themselves, each pursuing that course which is most favorable to his particular client, should not be expected to conceive, agree upon, present and execute a plan which will expeditiously, economically and justly determine a complex case. Nor is it likely that the judge will be able to agree at all times throughout the litigation with either or both of the opposing advocates on the precise manner of processing the litigation or on rulings on the pretrial questions. The parties and their advocates expect the judge fairly and efficiently to perform his mission and commitment. Failure by the judge to do so leads to disappointment, confusion, inordinate delay, and injustice.

In its *Report on Administration of Ontario Courts*, this Commission also commented on the importance of involvement by the court in the management of litigation.[44] Our comments in that Report were not directed specifically to class litigation, but rather to civil litigation generally; moreover, our remarks were confined to the assumption of a supervisory role by the court after a case has been placed on the list for trial.[45] Nonetheless, what we said on that occasion seems relevant to the present discussion. We stated:[46]

> suggestions for courts in managing complex individual and class action litigation through pretrial and trial phases. It is highly respected among bench and bar. Its many suggestions are advisory and not mandatory. Accordingly, though many are followed, others have been the subject of divergent views among the courts. The Manual is revised on a continuing basis, in order to incorporate the benefit of new precedents and experiences.

The recommendations are not binding and are in general form. Therefore, in each case there must be a decision as to their applicability: see Newberg, *ibid.*, *n.* 10.

A manual prepared for use in the Los Angeles Superior Court also contains some useful suggestions. This manual is reprinted in Newberg, *supra*, note 10, Vol. 1, Appendix Item 1, at 372 *et seq.*

[43] Manual, *supra*, note 38, §1.10, at 32-33.

[44] Ontario Law Reform Commission, *Report on Administration of Ontario Courts*, Part I (1973), at 13 *et seq.*

[45] *Ibid.*, at 14. Even in that context, two members of the Commission, the then Chairman, Mr. H. Allan Leal, and the Honourable Richard A. Bell, believed that the supervisory responsibility should be assumed by the courts from the time a proceeding is commenced: see *ibid.*, at 14, *n.* 19.

[46] *Ibid.*, at 13 (footnotes omitted).

On the civil side, slightly different considerations arise in the attempt to set management goals. Traditionally, a controversy between individuals has been regarded as their own business, even after a court action has been commenced. Subject to an occasional 'purging' of the list, the judges and those responsible for court administration traditionally have assumed a passive role even up to the day of trial unless moved at the instance of one of the parties or their counsel. Rules as to time limitation have been set in operation only if a non-delinquent party chooses to invoke them. Where both counsel agree that a case should not proceed, the commonly held view among lawyers is that the court should have no right to force the matter on for trial or other disposition.

In our view this traditional approach to civil litigation has been one of the major contributing factors to delays in the court system. While on occasion there are good reasons for delay, we believe that the Courts generally should have the right to intervene in the management of the flow of civil litigation coming before them to ensure in the public interest that cases are properly and speedily brought to trial. If management of litigation is left to the lawyers alone, the adversary system occasionally puts them in conflict with the public interest, for delays and procrastination may in certain cases be in the best interests of their private clients.

Having discussed the traditional model of litigation and the ways in which class actions deviate from it, we turn to consider what powers courts should have to enable them both to protect the rights of absent class members and to ensure the efficient and fair prosecution of class litigation.

(b) Powers of the Court

(i) General

Many of the class action mechanisms that we have examined contain provisions empowering courts to make orders for the better conduct of class litigation.[47] Because these provisions are similar in substance to Rule 23(d) of the United States Federal Rules of Civil Procedure, we intend to focus our attention on that Rule. Subdivision (d) of Rule 23 provides as follows:

> 23(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, [the general provision dealing with pre-trials under the Federal Rules] and may be altered or amended as may be desirable from time to time.

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[47] See, for example, U.C.A.A., *supra*, note 18, §9; South Australia Draft Bill, *supra*, note 24, s. 12, which refers to "doing justice as between the members of the class . . .", and deals primarily with additional orders in respect of costs; N.Y. Civ. Prac. Law §907 (McKinney); and C.C.P., *supra*, note 25, art. 1045.

Commentators often refer to Rule 23(d), and the specific techniques listed therein, as providing means whereby a court can devise procedures for handling problems raised by a particular class suit. For example, the *Manual for Complex Litigation* deals with management problems and the utility of Rule 23(d) as follows:[48]

> Rule 23 grants to the court broad discretionary powers to enable the court successfully to solve the novel administration problems posed in a class action by the unusually large number of members of the class, each of whom may have small monetary claims. Rule 23(c)(4) authorizes the court to form classes and subclasses when appropriate. Rule 23(d) authorizes the court to enter appropriate orders: (1) to determine and control the course of the proceedings; (2) to require additional or periodic notices to members of the classes or subclasses to protect their rights and to insure the fair conduct of the action; (3) to impose conditions on representative parties or intervenors; (4) to require that pleadings be amended; and (5) to enter other orders 'dealing with similar procedural matters.' Because of the almost plenary authority granted to the court to control class action litigation, the problems of administration, alone, ordinarily should not justify denial of an otherwise appropriate class action except when the administration and resources required to be devoted strictly to administrative matters will frustrate the securing of ultimate relief to which the class members may be entitled.

Earlier in this Report,[49] we described the manageability problems that have arisen in the United States under Rule 23 of the Federal Rules of Civil Procedure. We noted, in particular, the difficulties and cost associated with notice and the obstacles presented in calculating monetary relief and distributing it to the members of the class. In subsequent chapters, we shall recommend the adoption of provisions concerning notice[50] and monetary relief[51] designed to allow the court to formulate procedures, consistent with fairness to the parties, that will circumvent problems raised by notice and the calculation and distribution of monetary relief. Furthermore, the cost-benefit test that we have recommended[52] would allow a court to refuse to certify a class action where it concludes that the administrative burdens that a particular class action would impose upon the court, even after taking into account the provisions for notice and calculation and distribution of monetary relief, would exceed any benefits that it could confer. Accordingly, the proposed *Class Actions Act* will contain specific provisions designed to equip the court to deal with many of the more difficult manageability problems that have surfaced in the United States under Rule 23.

In addition to these specific provisions, however, we are of the view that the court should have a broad general power in order to enable it to respond

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[48] Manual, *supra*, note 38, §1.43, at 63-65 (footnotes omitted). See, also, Harvard Developments, *supra*, note 37, at 1503-04, and Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality and the 'Class Action Problem' " (1979), 92 Harv. L. Rev. 664, at 667-68.

[49] See *supra*, ch. 9, sec. 2(a)(iv).

[50] *Infra*, ch. 13.

[51] *Infra*, ch. 14.

[52] See *supra*, ch. 9, sec. 3(c).

to the many management problems that are likely to arise at the various stages of a class action. Only if judges are empowered expressly to assume an active role can this type of complex litigation be handled efficiently and the interests of absent class members be protected against unnecessary dismissal of a class action because of manageability problems.

Such a general management power may be found in Rule 23(d). This Rule, we would note, contains both general and specific powers. With respect to the specific powers found in Rule 23(d), in chapter 13 of this Report we shall make detailed recommendations regarding notice that will comprehend the matters covered in subdivision (d)(2) of Rule 23.[53] In chapter 8, the Commission made recommendations concerning the power of the court to permit intervention by members of the class on such terms and conditions as it considers proper.[54] These proposals mirror in part subdivision (d)(3) of Rule 23. Finally, in chapter 10, the Commission dealt with the court's power in the case of a refusal to certify or decertification of a class action, which is similar to that found in Rule 23(d)(4).[55]

The general management power is to be found in subdivisions (d)(1) and (d)(5) of Rule 23, which empower a court to control the conduct of class litigation. Such provisions may be found in other class action legislation and proposals, such as the proposal under consideration by a committee of the Section of Litigation of the American Bar Association. Section 3009(a) of that proposal states in part that "[t]he Court may make all orders, not otherwise prohibited by law, reasonably necessary for the efficient and fair management of these actions".[56]

The Commission is of the view that the proposed *Class Actions Act* should contain such a power. Accordingly, we recommend that the court, upon the application of a party or upon its own motion, should be empowered to make all appropriate orders determining the course of a class action for the purpose of ensuring the fair and expeditious determination thereof, including an order to prevent undue repetition or complication in the action. In making any such order, the court should be able to impose such terms and conditions upon the parties as it considers proper.[57]

It will be noted that this recommendation would empower a court to make orders on its own motion. Such a power, while unusual in the Canadian context, is not without precedent. For example, the Ontario Rules of Practice authorize a court, on its own motion, to order a pre-trial conference.[58] Rule 25 of the Nova Scotia Civil Procedure Rules goes even further, and empowers

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[53] See *infra*, ch. 13, sec. 4(c).

[54] See *supra*, ch. 8, sec. 4(d).

[55] See *supra*, ch. 10, sec. 4(a) and (c)(ii).

[56] See Proposed A.B.A. Legislation, *supra*, note 20, §3008(a).

[57] See Draft Bill, s. 15. It should be noted that the recommended provision would also enable the court to exercise any of the powers given to it under the proposed *Class Actions Act* on its own motion.

[58] Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540, r. 244.

the court, on its own motion, to make a wide range of orders, including an order giving "directions as to the procedure to govern the future course of any proceeding, which directions shall govern the proceeding notwithstanding the provision of any rule to the contrary".[59] In our view, it would be desirable to allow the court to make orders under the proposed management provision on its own motion, although we would expect the court to invoke this power cautiously and prudently.

It may be argued that the general management power that we have recommended is unnecessary, given the inherent jurisdiction of the court. In our view, however, the exact scope of the courts' inherent jurisdiction is far from clear.[60] Moreover, it would seem that courts are reluctant in many cases to exercise the power to control their own process.[61] We believe that the inclusion in the proposed *Class Actions Act* of an express general management power would encourage Ontario courts to resort to this power to ensure the proper functioning of class actions.

While we do not wish to limit in any way the flexibility that we intend should be inherent in our proposed management provision, it may be useful to give some examples of the types of order a court might make under this provision. In this respect, reference should be made to the *Manual for Complex Litigation*,[62] referred to earlier. Judges and counsel involved in class actions in this jurisdiction may wish to consult the Manual on occasion, as it represents the distilled experience of members of the American federal judiciary with class actions.

The *Manual for Complex Litigation* contains recommendations for a series of four pre-trial conferences designed to ensure that the court retains firm control of a class action from the time it is initiated until the determination of the common questions. In a class action conducted in accordance with the Manual, the first conference is held at the initiation of the lawsuit; its purpose is primarily to ensure that the class issue (corresponding to the Commission's proposed certification motion) will be determined early in the litigation and that all related issues are disposed of in an appropriate manner.[63] The second pre-trial conference is usually held after the class issue

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[59] Nova Scotia Civil Procedure Rules and Related Rules, r. 25.01(1)(d).

[60] For a general discussion of the question of the inherent jurisdiction of the court, see Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Curr. L. Prob. 23.

[61] See, for example, the narrow interpretation given to what is now r. 1 of the Supreme Court of Ontario Rules of Practice, *supra*, note 58, in *Crombie v. The King* (1922), 52 O.L.R. 72, [1923] 2 D.L.R. 542 (App. Div.); *Kemp v. Beattie* (1928), 63 O.L.R. 176, [1929] 1 D.L.R. 55 (H.C. Div.); *Andreacchi v. Perruccio*, [1972] 1 O.R. 508 (C.A.); *Glover v. Glover (No. 1)* (1980), 29 O.R. (2d) 392 (C.A.), aff'd *Glover v. Minister of National Revenue*, unreported (December 17, 1981, S.C.C.); and *Glover v. Glover (No. 2)* (1980), 29 O.R. (2d) 401 (C.A.), aff'd *Glover v. Bell Canada*, unreported (December 17, 1981, S.C.C.). Compare *Proctor v. Proctor* (1979), 26 O.R. (2d) 394, 103 D.L.R. (3d) 538 (Div. Ct.), aff'd (1980), 28 O.R. (2d) 776, 16 C.P.C. 220 (C.A.).

[62] Manual, *supra*, note 38.

[63] *Ibid.*, §1.00, at 30 *et seq.*

has been decided, and is concerned principally with fixing a schedule for discovery.[64] The third pre-trial conference deals with such issues as establishing a schedule for all subsequent steps in the action, the appointment of a master, and the appointment of experts.[65] The fourth conference is similar to the pre-trial procedure under the Ontario Rules of Practice, and the matters of interest at this conference include the delineation and simplification of undetermined issues of fact and law, rulings on objections to written offers of proof, and special provisions for the conduct of the trial.[66]

Under our proposed management provision, it would be possible for the court to order similar pre-trial conferences. For example, the court and the parties might find it useful to hold a conference before the certification motion if it appears that the motion may be complex and protracted. At this conference, the court and the parties could discuss such matters as the timing of the certification motion and of the filing of affidavits to be used on the motion, as well as whether the defendant intends to attack the action under Rule 126 prior to the certification motion. In addition, the court might wish to use the management provision to set up a timetable for discovery and any motions arising from discovery.

We recognize that the initial reaction of some judges and lawyers to the Commission's recommendation for a broad general management power may be a fear that the proposed changes may undermine the adversarial system.[67] The term "adversarial system" is one that is often used without too much attention to its meaning; in our view, a thoughtful definition should focus upon the fact that such a system envisages the initiation and prosecution of lawsuits by the parties.[68] If these are the two salient characteristics of the adversarial system, the recommendation made in this section should not threaten this system in the slightest.

(ii) Subclassing

Subclassing is an established technique under Rule 23 for managing class litigation and allowing the court to certify the action as a class action even where there are differences in interest among members of the class. Rule 23(c)(4)(B) states:

> When appropriate . . . (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

The most important function of subclassing is to ensure that the interests of various groups of class members are adequately safeguarded. The Harvard

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[64] *Ibid.*, §2.00, at 123 *et seq.*

[65] *Ibid.*, §3.00, at 168 *et seq.*

[66] *Ibid.*, §4.00, at 192 *et seq.*

[67] For a paper dealing with this topic, see Brooks, *supra*, note 31.

[68] Brooks, *ibid.*, at 91, defines the adversarial system as "a procedural system in which the parties and not the judge have the primary responsibility for defining the issues in dispute and for carrying the dispute forward through the system".

article on developments in class actions describes the potential of subclassing as follows:[69]

> Subclassing provides the trial judge with a means of increasing the reliability of party representation of absentee interests by, in effect, adding additional parties to the lawsuit who more accurately reflect in their own interests the interests of discrete groups of absentees. Absent subclassing, class representatives are likely to have to rank the interests of class members as a precondition to advocacy. The possibility emerges, therefore, that the interests of some class members will either never be represented, because regularly given low priority, or only be sporadically asserted, because of changes in the representative's priorities during the course of litigation. By dividing a class, a judge may be able to redefine the responsibilities of class attorneys and named plaintiffs in terms of the interests of distinct and relatively unified portions of a class. The necessity for the ranking of class interests by the parties may therefore diminish, and the likelihood that diverse absentee interests will be presented to the court increase.

In addition, subclassing can be useful in dealing with the commonality requirement found in the Rule 23 family of class actions: the existence of individual questions may pose less difficulty if those members of the class who are subject to special defences or who wish to assert particular claims are placed in a subclass in order to protect their interests or to answer the special defences raised against them.[70] The merits of subclassing in accommodating various interests and special claims and defences within the class have been widely approved.[71] The *Manual for Complex Litigation* describes the role of subclassing as follows:[72]

> Critical in any proper disposition of a class action is the determination of the appropriate classes or subclasses to be represented. Although Rule 23(c)(3) of the Federal Rules of Civil Procedure requires final description of the classes or subclasses only in the judgment to be entered, it is essential that the class or subclasses be identified as early as possible and be described in the order determining whether the class action may be maintained. Rule 23(c)(4) authorizes the court to divide the class into appropriate subclasses. The rule 'is particularly helpful in enabling the courts to restructure complex cases to meet the other requirements for maintaining a class action.' The ultimate determination of the appropriate classes or subclasses can be made only if the court has, in the record before it, reliable economic data on the structure and practices of the industry involved in the litigation or other appropriate data on possibly common factual and legal issues in the action, or both. Generally speaking, it is when economic interests within the class are in conflict or are greatly varied that the court must give consideration to identifying and describing subclasses. 'When monetary damages are sought the reasons that the district courts may see fit to confine the class more narrowly are, first, to protect the defendant in preparing his defenses against various damage claims, and second, to make the disposition of the class action more manageable since the evidence as to individual claims

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[69] Harvard Developments, *supra*, note 37, at 1479 (footnote omitted).

[70] See Wright and Miller, *supra*, note 38, Vol. 7A, §1790, at 185 *et seq.*

[71] See, for example, Newberg, *supra*, note 10, Vol. 3, §4500, at 76-77, and Pohl, "Developments in the Law of Federal Class Action Litigation – Catch 22 in Rule 23" (1973), 10 Houston L. Rev. 337, at 359.

[72] Manual, *supra*, note 38, §1.42, at 52.2-54 (footnotes omitted).

> may vary widely in scope and character.' Conflicts or wide divergences in claims of liability may warrant denial of class action treatment. Conflicts or wide divergences in economic or monetary interest, on the other hand, do not ordinarily warrant denial of class action treatment, but require in many instances the creation of appropriate subclasses.

Notwithstanding the utility of subclassing, there are limitations upon its use imposed by the final clause of Rule 23(c)(4)(B), which requires that each subclass satisfy the prerequisites for certification.[73] For example, a court could decide that, although part of a class had an interest antagonistic to that of the other class members, this group was not sufficiently numerous to meet the numerosity prerequisite[74] and, therefore, could not form a subclass.[75]

While many of the American class action mechanisms contain a provision allowing the court "to subclass" in appropriate circumstances,[76] it is noteworthy that Canadian and Australian class action proposals – Williams' Model Consumer Class Actions Act,[77] Bills C-42[78] and C-13,[79] and the Draft Bill for a Class Actions Act of the Law Reform Committee of South Australia[80] – do not contain a provision authorizing subclassing, although this omission is never explained.

On balance, the Commission has concluded that there should be no specific provision dealing with subclassing in the proposed *Class Actions Act*: such a provision, in our opinion, would unnecessarily complicate matters. We believe that the recommendations that we have made with respect to intervention by class members[81] and the general management provision should enable the court to resolve the types of problem that have been dealt with in the United States by means of the subclassing device. For example, if at any time in a class action it appears that a group within the class needs additional representation, a member of the group could apply to represent the interests of the group to the extent that the representative plaintiff cannot, or is unwilling, to do so. Similarly, if certain issues are common to only part of a class, the court could accommodate these differences by invoking its powers under the general management provision.

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[73] See Wright and Miller, *supra*, note 38, Vol. 7A, §1790, at 191-92.

[74] See *supra*, ch. 8, sec. 2.

[75] In this instance, the court should exclude it altogether from the class action through redefinition; it would not be legitimate to prohibit the class action altogether. See the discussion of redefinition in Harvard Developments, *supra*, note 37, at 1476-77.

[76] See, for example, U.C.A.A., *supra*, note 18, §2(c)(3); A Bill To provide for the reform of class action litigation procedures, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill S. 3475, 95th Cong., 2d Sess. (1978), §3028(b); N.Y. Civ. Prac. Law §906.2 (McKinney); Illinois Civil Practice Act, *supra*, note 18, §57.3(b); and Tex. R. Civ. P. 42(d)(2).

[77] Williams' Model Act, *supra*, note 21.

[78] Bill C-42, *supra*, note 22.

[79] Bill C-13, *supra*, note 23.

[80] See South Australia Draft Bill, *supra*, note 24.

[81] See *supra*, ch. 8, sec. 4(d).

(iii) Coordination of Related Claims

In the case of a mass wrong, it is easy to envisage that more than one class action, seeking similar relief, may be commenced. It is also possible that members of the class may commence individual actions against the defendant, either before a class action is brought or in ignorance of the existence of a class action on their behalf. The question that arises is whether the proposed *Class Actions Act* should contain a specific provision empowering the court to stay other class actions for the same relief or individual actions claiming similar relief. In our opinion, such an express provision is unnecessary, since a court today is able to coordinate related actions under its power to stay litigation pursuant to section 18.6 of the *Judicature Act*.[82]

4. JURISDICTION OVER CLASS ACTIONS

(a) The Court

We turn now to consider which court or courts should have jurisdiction over class actions brought pursuant to the proposed *Class Actions Act*. In the view of the Commission, this question may be narrowed to whether both the High Court of Justice and the county and district courts should have jurisdiction to hear class actions. It seems clear to us that class actions should not be tried in the small claims courts. While these courts may be well suited to dispose of small claims on an informal and inexpensive basis, they are obviously ill-equipped to deal with class litigation, which will ordinarily be both complex and lengthy. We, therefore, recommend that the small claims courts and the Provincial Court (Civil Division) of The Municipality of Metropolitan Toronto should not have jurisdiction over class actions.[83]

The High Court, with its unlimited monetary and subject matter jurisdiction, seems clearly suited to handle class actions. While requiring that all class actions be brought in the High Court would, no doubt, impose additional burdens upon that Court, there are several factors that favour exclusive jurisdiction in the High Court. Because of the likely complexity of class actions, the large amounts of money that may be involved, and the fact that a class action will determine the rights of many individuals who are not before the court, it may be argued that all class actions should be heard in the Province's highest court. Moreover, having the High Court hear all class suits would allow it to develop, in a short time, an expertise with such litigation and appropriate management techniques. It should be noted that a form of representative action, derivative suits under the *Business Corporations Act*,[84] may be brought only in the High Court.

The only real issue, then, would appear to be whether the county and

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[82] R.S.O. 1980, c. 223.

[83] See Draft Bill, s. 1(*c*), for the definition of "court".

[84] *Business Corporations Act*, R.S.O. 1980, c. 54, s. 97. See the definition of "court" in s. 1(1)11.

district courts should also be given jurisdiction over class actions.[85] At present, the monetary jurisdiction of the county and district courts is $15,000;[86] however, this restriction can effectively be waived by the parties.[87] There is little doubt that, as a result, the county and district courts do try complex cases in which large monetary awards are made. Moreover, given the fact that the High Court of Justice sits regularly only in Toronto, and only infrequently in the counties outside Toronto, it is possible that a class action could be disposed of more quickly and at less cost if it could be brought in a county or district court.

On balance, we are not convinced that the reasons for granting the High Court jurisdiction to hear class actions are sufficiently compelling to justify giving that Court exclusive jurisdiction. Accordingly, we recommend that it should be possible to bring an action under the proposed *Class Actions Act* either in the High Court or in a county or district court.[88] In order to preclude uncertainty concerning the question whether the monetary jurisdiction should be determined by the amount of individual claims or the total amount of the claims asserted on behalf of the class,[89] we recommend that the latter amount should govern.

(b) The Presiding Judge

We now turn to a discussion of the important question of who should preside at the various stages of a class action.

In the United States, it is a strongly held view that one judge, and only one judge, should be responsible for the management of a class action from its commencement to its termination.[90] In other words, one judge should

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[85] One of the Commissioners, the Honourable Richard A. Bell, wishes to mention that this problem would not arise if there were a merger of the High Court and the County and District Courts into one superior court, as he advocates: see his dissent at pages 92-102 of the Commission's *Report on Administration of Ontario Courts, supra*, note 44. He notes that, since this dissent, merger has been achieved in most provinces of Canada.

[86] *County Courts Act*, R.S.O. 1980, c. 100, s. 14(1), as am. by *The County Courts Amendment Act, 1981*, S.O. 1981, c. 24, s.1 (proclaimed in force on September 8, 1981), which raises the monetary jurisdiction to $15,000 from $7,500.

[87] *County Courts Act, ibid.*, s. 14(2).

[88] See Draft Bill, s. 1(*c*), for the definition of "court".

[89] It will be recalled that, where the $10,000 minimum monetary jurisdictional requirement of the United States federal courts applies, it has been held that each member of the class must have a claim in excess of $10,000 for the class action to be brought in the federal courts: see *Snyder v. Harris*, 394 U.S. 332, 89 S. Ct. 1053 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S. Ct. 505 (1973). See, also, *supra*, ch. 2, sec. 2(e).

The cases interpreting r. 656 of the present Ontario Rules of Practice, dealing with costs where a case is brought in a higher court when it lies within the competence of a lower court, suggest that the value of the claims in the aggregate would be the critical amount in determining jurisdiction: see *Rickwood v. Town of Aylmer*, [1954] O.W.N. 858 (H.C.J.).

[90] See, for example, Harvard Developments, *supra*, note 37, at 1417 *et seq.* This idea was also clearly conveyed at a meeting between Chief Judge J.B. Weinstein of the United States District Court, Eastern District of New York, and a consultant to the Commission.

oversee the litigation from beginning to end in order to ensure its expeditious progress through the various stages. This view is enshrined in the *Manual for Complex Litigation* which is very clear about the desirability of assigning the litigation to one judge soon after its initiation. The Manual states:[91]

> First Recommendation: Each Complex Case should be assigned in its entirety to one judge for all purposes, including all pretrial proceedings. In districts where actions are not automatically assigned on filing to a single judge, such assignment should be made as soon as the case has been identified as a complex case.
>
> That complex cases can most efficiently be processed by their early assignment to one judge for all purposes seems to be accepted with substantial unanimity.

The Manual is not alone in recommending the assignment of a class action to a single judge. The practice seems widespread among United States district courts.[92] Moreover, the new Quebec class action legislation provides as follows:[93]

> 1001. Unless the chief justice decides otherwise, the same judge designated by him hears the entire proceedings relating to the same class action.
>
> Where the chief justice considers that the interest of justice so requires, he may designate such judge notwithstanding articles 234 and 235.

In a related vein, the Civil Procedure Revision Committee, in its recent Report,[94] has proposed that the Chief Justice of the High Court, in appropriate cases, should be able to direct that all motions pertaining to an action be heard by a judge designated by him. Proposed Rule 37.12 states as follows:

> 37.12 Where an action in the Supreme Court involves complicated issues or where there are two or more actions in the Supreme Court arising out of the same transaction, occurrence, or series of transactions or occurrences, involving similar issues, the Chief Justice of the High Court may direct that all motions in any such action or actions be heard by a particular judge designated by him.

This Rule recognizes that there are some cases that will benefit from the continuity of supervision provided by one judge, a view shared by this Commission.

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[91] Manual, *supra*, note 38, §0.30, at 24-25 (footnote omitted).

[92] See Newberg, *supra*, note 10, Vol. 3, §3220, at 6 (footnotes omitted):

> Early assignment of a class action to a single judge for all purposes assures efficient processing of the litigation. Most districts automatically assign all newly filed actions to a single judge. Other districts provide for subsequent assignment of an action to a single judge on motion by a party, or by the chief judge, after the suit is identified as a complex case.

[93] See C.C.P., *supra*, note 25, art. 1001.

[94] Province of Ontario, Ministry of the Attorney General, Civil Procedure Revision Committee, untitled report (1980) (hereinafter referred to as the "Williston Committee Rules").

(i) Prior to the Trial of the Common Questions

While it appears to be common practice in the United States for the same judge to remain active in class litigation from its commencement to its final disposition, the notion that a judge who is involved in pre-trial matters should also take the trial may well be controversial in this jurisdiction. Other Canadian jurisdictions, on the other hand, notably Nova Scotia[95] and British Columbia,[96] permit, but do not oblige, a judge responsible for a pre-trial hearing to preside at the trial of the action. Moreover, it must be acknowledged that certain advantages would flow from having the same judge preside over all stages of a class action. These benefits include a greater familiarity with the issues in the litigation and an ability to concentrate at trial upon the issues that are truly in dispute. Nevertheless, we have concluded that, as a general rule, a judge who presides at proceedings before trial in a class action should not preside at the trial of the common questions.

In Ontario, the judge who presides at a pre-trial conference cannot take the trial.[97] The reason behind this separation of function, presumably, is a fear that a judge who becomes acquainted with the case through the pre-trial hearing may "pre-judge" the litigation and, therefore, may decide the case on the basis of something other than the evidence presented in court. In addition, where, at the pre-trial hearing, there has been discussion of settlement, the parties may feel that it will be extremely difficult to convince the judge that damages should be assessed outside the range proposed at the pre-trial. Perhaps most importantly, however, we have recommended that, on the certification motion, the judge should scrutinize the merits of the action;[98] accordingly, it may be perceived as inappropriate to have the same judge deal with the merits at the trial of the action. While, as we have indicated, there is an obvious difference between the preliminary merits test proposed by the Commission and the ultimate trial of a class action, we believe that, in order to ensure an appearance of fairness, a different judge from the one who has been responsible for pre-trial proceedings should preside over the trial of the common questions, except where the parties and the judge agree otherwise. We so recommend.[99]

Subject to this recommendation, we believe that there are advantages to having as much continuity of supervision and management as possible in a class action. Accordingly, we recommend that, upon the commencement of an action under the proposed *Class Actions Act*, it should be assigned to a judge, and that judge should preside over all pre-trial motions and interlocutory proceedings.[100] Presumably, this assignment would come from the Chief

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[95] See Nova Scotia Civil Procedure Rules and Related Rules, r. 26.01(3).

[96] See British Columbia Supreme Court Rules, B.C. Reg. 310/76 as am., r. 35(5).

[97] See Supreme Court of Ontario Rules of Practice, *supra*, note 58, r. 244(3).

[98] See *supra*, ch. 7, sec. 4.

[99] See Draft Bill, s. 51(1).

[100] *Ibid.* See, also, Draft Bill, s. 51(2), with respect to the designation of another judge where, for any reason, the presiding judge is unable to continue.

Justice of the High Court, in the case of class actions to be heard in the High Court, and from the Chief Judge of the County and District Courts, in the case of class actions to be heard in those courts.

With respect to class actions tried in the county and district courts, this recommendation would not give rise to administrative difficulties. With respect to actions commenced in the High Court in Toronto, the fact that the judge presiding over a class action is on circuit[101] would not appear to present insurmountable problems: most motions and conferences concerning the class action simply would have to take place when the judge is in Toronto. Any disruption caused by the judge's absence from Toronto while on circuit could be minimized by such expedients as conference telephone calls.[102] Alternatively, a judge might be assigned to sit in Toronto for an extended period of time to deal exclusively with pre-trial matters in the class actions for which he has responsibility.

The more troublesome situation occurs where a class action is filed in the High Court outside of Toronto. A High Court judge will be in a county only at certain times of the year. Obviously, it would be extremely awkward to have the same judge assigned repeatedly to the same county simply to hear matters arising out of a particular class action. Two alternatives present themselves for consideration.

First, conference telephone calls might be employed.[103] Secondly, it might be possible to enlist the assistance of county and district court judges. This would not be a drastic departure from present practice, since county and district court judges, sitting as local judges of the High Court, are now empowered to hear many motions in High Court matters.[104] We recommend

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[101] For a description of the circuit system in Ontario, see Ontario Law Reform Commission, *Report on Administration of Ontario Courts, supra*, note 44, at 122 (footnotes omitted):

> The provisions of the present *Judicature Act* respecting the organization of the circuit system are very little different from those existing at the turn of the century. Courts must sit in each of the 48 county or district towns twice a year and such sittings are in practice presided over by a judge of the Supreme Court.
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> . . . .
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> Sittings of the High Court in all county and district towns are fixed twice a year by the judges of the High Court. The lists are drawn according to the number of circuits and the number of weeks assigned to each sitting of the Court. A judge is assigned to each sittings. Where possible an attempt is made to follow the practice of allowing each judge taking a circuit one week free in every five during which time the judge can research and write his reserved judgments and generally attempt to stay abreast of developments in the law. Open assignments are usually included in each circuit, with the knowledge that the judges who are free may be used to fill emergency situations where another judge, previously assigned, has become ill or where an extra judge is required in a particular county or district to help clear up untried cases there.
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> A circuit guide is printed and distributed to all local registrars, sheriffs, gaolers and members of the legal profession in advance of the commencement of the first sittings included in the circuit guide.

[102] See Williston Committee Rules, *supra*, note 94, r. 37.10.

[103] *Ibid.*

[104] See Supreme Court of Ontario Rules of Practice, *supra*, note 58, rr. 211-12.

that, where a class action is commenced in the High Court outside of Toronto, the Chief Justice of the High Court, in consultation with the Chief Judge of the County and District Courts, should be able to appoint a judge of a county or district court of the county or district in which the action is brought to conduct all proceedings prior to the trial of the common questions as a local judge of the High Court.[105]

The recommendation that one judge preside over a class action until the trial of the common questions raises the question whether a master, in the case of a class action, should hear those motions over which he otherwise would have jurisdiction. At present, the jurisdiction of the master is reasonably wide:[106] he is empowered to hear such matters as motions for the amendment of pleadings and motions to re-attend to answer questions on discovery. Obviously, if the master were to hear such motions in a class action, the workload of High Court judges would be correspondingly reduced. On the other hand, there is much to be said on the grounds of efficiency for having a High Court judge hear all matters relating to the class action over which he will be presiding; in a short time, he will gain a detailed familiarity with the case that can be used as a basis for dealing with any question brought before him.

Because the Commission perceives the role of a judge, and his responsibility for all proceedings prior to the trial of the common questions, to be fundamental, we have concluded that all pre-trial motions and proceedings should be in the hands of the pre-trial judge, even those over which a master would otherwise have jurisdiction. We so recommend.

(ii) Following the Trial of the Common Questions

The Commission has also considered whether the same judge who presides at the trial of a class action should be involved in any proceedings that are necessary following the determination of the common questions.

From the analysis that will appear in subsequent chapters,[107] it will be apparent that, where a judge disposes of the common questions in favour of the class, it will be necessary in many cases for him to establish some procedure whereby the claims of individual class members can be resolved. For example, some mechanism will be necessary where monetary relief has been calculated in the aggregate,[108] where monetary relief has to be assessed on an individual basis,[109] and where individual questions other than those related to monetary relief remain to be resolved. The nature of the post-common questions proceedings will be examined in later chapters of this Report.[110] Suffice it to state at this juncture that the trial judge will not

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[105] See Draft Bill, s. 51(3).

[106] See rr. 209-10 of the Supreme Court of Ontario Rules of Practice, *supra*, note 58.

[107] See *infra*, chs. 14 and 15.

[108] See *infra*, ch. 14, sec. 3(c).

[109] See *infra*, ch. 15, sec. 2.

[110] See *infra*, chs. 14 and 15.

necessarily have to preside over all "post-common questions proceedings". However, it will be necessary for some official to give directions from time to time during the course of these proceedings.

In the view of the Commission, there are compelling reasons why the judge who has presided at the trial of the common questions should also continue to supervise subsequent proceedings. Having determined the common questions, the trial judge will have an extensive knowledge of the litigation, including the nature of the individual issues. It would be a duplication of effort to require another judge to supervise the post-common questions proceedings, or part of them. At the same time, there would seem to be no serious problems where a High Court judge goes on circuit in requiring the judge who has disposed of the common questions to supervise these subsequent proceedings.[111] Accordingly, the Commission recommends that the judge hearing the trial of the common questions should also supervise all subsequent proceedings.[112]

(c) Trial by Jury in Class Actions

In two separate Reports published approximately six years apart, this Commission has expressed its opposition to the use of civil juries. In our *Report on Administration of Ontario Courts*,[113] we recommended the abolition of civil juries except in limited instances such as actions for libel and slander now provided for by section 57 of the *Judicature Act*.[114] In our *Report on Products Liability*, we recommended that any action tried under the proposed *Products Liability Act* should be heard without a jury.[115] We know of no reason why trial by judge and jury should be available in the class action context, where litigation is likely to be both novel and complex.[116] Accordingly, for the reasons outlined in our *Report on Administration of Ontario Courts* and our *Report on Products Liability*, the Commission recommends that no action under the proposed *Class Actions Act* should be tried by a judge with a jury.[117]

5. STRUCTURE OF CLASS LITIGATION

In this section, we turn our attention to matters relating to the structure of class actions. We shall examine, first, the right of a defendant against

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[111] Again, the conference telephone call would be one means of overcoming any problems arising from the fact that the judge happens to be on circuit: see Williston Committee Rules, *supra*, note 94, r. 37.10.

[112] See Draft Bill, s. 51(1). See, also, s. 51(2), dealing with the designation of another judge where the presiding judge is unable to continue for any reason.

[113] *Supra*, note 44, at 329 *et seq.*

[114] R.S.O. 1980, c. 223.

[115] Ontario Law Reform Commission, *Report on Products Liability* (1979), at 102-04.

[116] For a discussion of this point in respect of class actions in the United States, see Wright and Miller, *supra*, note 38, Vol. 7A, §1801, at 265-69. See, generally, Note, "The Right to a Jury Trial in Complex Civil Litigation" (1979), 92 Harv. L. Rev. 898.

[117] See Draft Bill, s. 50.

whom a class action is brought to assert counterclaims against some or all of the class members. Secondly, we shall consider the applicability to class actions of the Rules of Practice respecting the consolidation of actions, third party claims, and cross-claims.

(a) Counterclaims

In a class action, a defendant may wish to assert a counterclaim[118] against individual members of the class or against the class as a whole.

In the United States, it has been contended that counterclaims are often used by defendants in class actions as a tactical means of eliminating such actions, either by raising so many individual questions that the common questions predominance test of Rule 23(b)(3) is not satisfied, or by encouraging individual members to opt out of Rule 23(b)(3) class actions.[119] Particularly in the early cases decided under Rule 23, the assertion of counterclaims was successful in having certification denied on the grounds of lack of predominance of common questions or unmanageability of the class action.[120]

At the present time, the law with respect to the right of a defendant to assert counterclaims in a class action would appear to be as follows.[121] If the counterclaim is asserted on a class wide basis, it should be disallowed unless the criteria under Rule 23 for maintaining a defendant class action are satisfied, a counterclaim against the plaintiff class as a whole being in fact a defendant class action. If the counterclaims are individual in nature, either they should be denied without prejudice to their reassertion after the determination of the common questions or, alternatively, they should be

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[118] The authority for counterclaims under the present Supreme Court of Ontario Rules of Practice is r. 116.

[119] See Lobell, "Defending a Truth in Lending Lawsuit" (1973), 6 U.C.C. L.J. 236, at 260-61, where the author states as follows:

> Now, for a few defensive techniques. The one that comes to mind first and perhaps the one with the greatest potential is the matter of counterclaims. Assertion of a counterclaim against defaulting and delinquent class members can serve two objectives. First, it can provide a basis for an argument that common issues do not predominate; and second, it can have an ad terrorem [*sic*] effect, hopefully persuading potential members of the class to opt out or not to opt in, depending on the applicable rule of civil procedure. That the counterclaim can successfully accomplish the first objective in Truth in Lending litigation is illustrated by a number of cases, in all of which the presence of counterclaims was cited as evidencing a lack of predominance of common questions. And, while the presence of counterclaims was not sufficient to persuade the court in the *Katz* case that class status was improper, the court there allowed the notice to the class to mention the possibility that counterclaims might be asserted against them if they chose to remain in the class, a fact which might convince large numbers to opt out, thereby reducing the size of the class.

[120] See *Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y. 1972), and Newberg, *supra*, note 10, Vol. 3, §4040, at 55, and the cases cited in *n.* .06.

[121] Newberg, *ibid.*, §4040a, at 56-58.

allowed, but a trial thereof deferred until the determination of the common questions in favour of the class.

Unfortunately, the Commission is unable to agree with respect to a defendant's right to assert a counterclaim in a class action. One Commissioner believes that the following scheme should govern. First, the general rules in respect of counterclaims should apply. For example, counterclaims should be permitted only if they can be tried conveniently with the plaintiff's claim; a counterclaim against the plaintiff and another who is not a party should be allowed only where the relief claimed relates to or is connected with the original subject-matter of the class action.[122] Secondly, counterclaims against the class as a whole should be governed by the present rules of procedure.[123] Thirdly, should counterclaims be asserted against members of the class on an individual basis, the court should not disallow the class action for that reason alone, but should consider the existence of counterclaims as a factor pertinent to the common questions predominance element of the proposed superiority requirement.[124] If the court decides that the presence of counterclaims against some class members indicates that there are too many individual issues, the court should be able to redefine the class so as to exclude the members against whom counterclaims have been asserted, and to allow the class action to proceed as redefined.[125]

By contrast, the other members of the Commission would place greater restrictions on the assertion of counterclaims. One member of the Commission would not allow counterclaims to be asserted in a class action at all. Two other Commission members would allow counterclaims only when they are asserted against the entire class. Finally, one Commissioner would allow the assertion of counterclaims only against the entire class or a substantial portion of the class.

(b) Consolidation, Third Party Claims, and Cross-Claims

Third party claims,[126] cross-claims,[127] and consolidation[128] are methods of disposing of claims that arise out of the factual occurrence that gives rise to the main action. The primary purpose of third party claims is to permit the

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[122] See rr. 114 *et seq.* of the Supreme Court of Ontario Rules of Practice, *supra*, note 58; s. 18.4 of the *Judicature Act*, R.S.O. 1980, c. 223; and Watson and Williams, *Canadian Civil Procedure* (2d ed., 1977), at 7-9 *et seq.*

[123] For a discussion of the present law regarding defendant class actions, see *supra*, ch. 2, sec. 2(c)(v).

[124] See discussion *supra*, ch. 9, sec. 3(b)(ii)a.

[125] For the Commission's recommendations regarding the amendment of a certification order, see *supra*, ch. 10, sec. 4(c)(ii), and Draft Bill, s. 9(2).

[126] Third party claims are authorized and governed by rr. 167 *et seq.* of the Supreme Court of Ontario Rules of Practice, *supra*, note 58. For a discussion of the scope of r. 167, see Halfnight, *supra*, note 30.

[127] Cross-claims are not permitted under the existing rules of civil procedure, but would be authorized by the Williston Committee Rules, *supra*, note 94, r. 29. A type of cross-claim can be asserted under the *Negligence Act*, R.S.O. 1980, c. 315.

[128] See r. 319 of the Supreme Court of Ontario Rules of Practice, *supra*, note 58.

defendant to bring into the action individuals who may be liable to the defendant for all or part of the claim asserted by the plaintiff. The main purpose of cross-claims is to allow defendants to assert claims against one another that are related to the main action, either in respect of the claim of the plaintiff or based on a separate claim of one defendant against another. Consolidation, on the other hand, enables separate actions arising of the same transaction or occurrence to be combined in one action.

Third party procedures exist under the United States Federal Rules of Civil Procedure[129] and do not seem to have caused any problems in the class action context. The same is true of cross-claims[130] and consolidation.[131] Given the Commission's recommendation that the Ontario Rules of Practice, generally speaking, should apply to class actions,[132] we see no need to make specific recommendations concerning consolidation, third party claims, or cross-claims, and their availability in the case of class actions.

Recommendations

The Commission makes the following recommendations:

1. The proposed *Class Actions Act* should contain an express provision authorizing the determination of common questions in common proceedings, and the resolution in individual proceedings of questions that require the participation of individual members of the class.

2. The proposed *Class Actions Act* should contain a broad management power, empowering the court, upon the application of a party or upon its own motion, to make all appropriate orders determining the course of a class action for the purpose of ensuring the fair and expeditious determination thereof, including an order to prevent undue repetition or complication in the action and, in making any such order, the court should be able to impose such terms and conditions upon the parties as it considers proper.

3. The small claims courts and the Provincial Court (Civil Division) of The Municipality of Metropolitan Toronto should not have jurisdiction over class actions.

*4. Both the High Court and the county and district courts should have jurisdiction over class actions, with the total amount of the claims asserted on behalf of the class, rather than the amount of individual claims, determining the question of monetary jurisdiction.

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[129] Fed. R. Civ. P. 14.

[130] Fed. R. Civ. P. 13(g). See Newberg, *supra*, note 10, Vol. 3, §4690, at 97-98.

[131] Fed. R. Civ. P. 42.

[132] See *supra*, ch. 6, sec. 1(b)(vi), and Draft Bill, s. 52.

* See *supra*, note 85, for a statement by the Honourable Richard A. Bell.

5. Upon the commencement of an action under the proposed *Class Actions Act*, it should be assigned to a particular judge, and that judge should preside over all pre-trial motions and interlocutory proceedings, even those over which a master would otherwise have jurisdiction.

6. Where a class action is commenced in the High Court outside of Toronto, the Chief Justice of the High Court, in consultation with the Chief Judge of the County and District Courts, should be able to appoint a judge of the county or district court of the county or district in which the action is brought to conduct all proceedings prior to the trial of the common questions as a local judge of the High Court.

7. In order to ensure an appearance of fairness, a different judge from the one who has been responsible for pre-trial proceedings should preside over the trial of the common questions, except where the parties and the judge otherwise agree, and the judge who tries the common questions should also supervise all subsequent proceedings.

8. The proposed *Class Actions Act* should provide that, if at any time during class proceedings the presiding judge is, for any reason, unable to continue, another judge should be designated in accordance with the practice of the court.

9. No action under the proposed *Class Actions Act* should be tried by a judge with a jury.

10. The proposed *Class Actions Act* should contain no express provisions respecting subclassing, third party claims, cross-claims, consolidation, or the coordination of related actions.

11. The Commission makes no recommendation regarding the assertion of counterclaims in the class action context.

CHAPTER 12

OPTING OUT AND OPTING IN

1. INTRODUCTION

One of the most controversial issues in the design of a class action procedure is whether class members should be bound automatically by the judgment, unless they exclude themselves from the action after certification, or whether class members, other than the representative plaintiff, should be required to take affirmative action after certification in order to be bound by the judgment on the common questions and as a prerequisite to receiving any benefits of the suit. This fundamental question has been referred to in the literature on class actions as the "opt out/opt in issue".

In an "opt out" type of class action, a judgment on the common questions binds the absent class members without requiring any manifestation of their desire to be bound; however, class members are permitted to exclude themselves from the action and from the effect of the judgment by indicating their desire to "opt out" in some manner following certification. A class member who has exercised his right to opt out is not entitled to share in any relief secured by the class; nor is he bound by a judgment adverse to the class. However, he may bring his own civil action for any injury caused by the defendant. In an opt out type of class action, failure to act on the part of a class member will mean that he will be bound by the judicial determination of the common questions and, if the action is successful, may receive his share of monetary relief.[1]

The term "opt in" has been employed to describe a procedure that is the converse of the kind discussed above. In other words, in a class suit employing an opt in procedure, a class member must "opt in" to or join a class action shortly after certification in order to be bound by the judgment. In the event of a failure to act, the absent class member will neither be bound by the judgment nor be entitled to share in the benefits of the action, but will be free to initiate his own action against the defendant.[2]

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[1] A class member may have to take action to receive a share of an aggregate award or, if there has not been an aggregate assessment, may be obliged to participate in subsequent proceedings: see discussion *infra*, chs. 14 and 15.

[2] A variation of the opt in procedure has been employed in Rule 23(b)(3) class actions by several courts in the United States. These courts have required class members to file a "proof of claim" form or other document by a specified date prior to the trial of the common issues as a prerequisite to a later claim for monetary relief: see discussion *infra*, this ch., sec. 2(b)(ii).

In considering which type of procedure should be recommended for inclusion in the proposed *Class Actions Act*, we have two concerns. First, we are concerned about the consequences of requiring affirmative action on the part of absent class members at an early stage of class proceedings as a prerequisite to their right to share in the fruits of a class action. Because the available empirical evidence appears to demonstrate that the choice of an opt in, as opposed to an opt out, regime will have significant implications for the number of class members who will secure relief through the class action, this is an important consideration.[3] The crucial, underlying question is whether the failure to signify an intention regarding involvement in the class suit reflects indifference on the part of class members, or the operation of the same social and psychological factors that inhibit persons from taking action to redress their injuries through individual civil actions.[4]

Secondly, we are mindful that the issue whether the proposed Ontario class action procedure should require class members to opt in to a class action, or should allow them to opt out of the suit, has implications for whether, and what kind of, notice should be given to the class. Providing an opportunity for taking affirmative action, or requiring certain conduct as a condition of securing benefits, demands the distribution of some form of notice to the persons concerned; if certain consequences follow from a decision whether to act, the specificity of the notice should be commensurate with the importance of these consequences. Thus, if the proposed *Class Actions Act* were to grant class members a right to opt out, this would favour sending some form of notice, with its attendant costs and administrative burdens.

If, on the other hand, the proposed *Class Actions Act* were to require class members to opt in, the severe consequences of a failure to act by absent class members would demand that a method and form of notice be employed that would ensure that class members are apprised of the practical significance of a failure to respond. Indeed, the incorporation of an opt in requirement in a class action procedure might suggest that individual notice should be sent to identifiable class members. Depending on the size and geographical distribution of the members of the class, the costs of individual notice could augment significantly the expense and the administrative complexity of prosecuting a class action. Although we shall discuss the issue of notice in the next chapter of this Report, we wish to emphasize the implications that a decision on the opt out/opt in issue will have for this question.

2. THE PRESENT LAW

(a) Ontario

Under the present law, a judgment in a class action brought under Rule

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[3] Staff of Senate Comm. on Commerce, 93d Cong., 2d Sess., *Class Action Study* (Comm. Print 1974), at 18-19 (hereinafter referred to as "Senate Study").

[4] For a discussion of social and psychological barriers to litigation, see *supra*, ch. 4, sec. 3(a)(ii)b.

75 of the Supreme Court of Ontario Rules of Practice[5] is binding upon the absent class members without requiring them to signify their intention to be so bound.[6] A class member may accept the advantages of a successful class action as a passive beneficiary. Active measures to obtain individual shares of monetary relief would be necessary only after judgment has been rendered against the defendant.[7] Thus, using the terminology that we introduced earlier, Rule 75 does not oblige class members to "opt in" to a class action before the common questions have been decided.

The fact that class members are bound automatically by the judgment in a class action creates an exception to the fundamental principle that a judgment binds only the parties to an action.[8] Moreover, the case law has not acknowledged any general right in individual class members to exclude themselves from the effect of a judgment. Several English cases, however, suggest that a person who prefers not to be bound as a member of the class may apply to the court to be made a defendant in the action.[9]

The practice sanctioned by these English decisions is an apparent attempt to recognize the interests of dissentient class members. However, even if these cases were applicable in Ontario, there are two factors that would militate against achievement of this objective. The first is that, as we have explained in chapter 2,[10] Rule 75 does not require that notice of the action be given to the class. As a result, class members who may wish to apply to be made defendants may well be unaware of the existence of the action. While they remain ignorant of the suit, it may proceed to judgment, after which the *res judicata* effect will prevent the initiation of independent actions. The second problem lies in the degree of activity demanded of the class member. Requiring a person who prefers to be excluded from the class to apply to the court usually will necessitate the services of a lawyer, with attendant costs in time and money. Thus, even if the class member somehow becomes aware of the class action and determines to seek exclusion from the class, he will be obliged to take a relatively expensive and cumbersome route to achieve this end.

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[5] R.R.O. 1980, Reg. 540.

[6] See *Commissioners of Sewers of the City of London v. Gellatly* (1876), 3 Ch. D. 610 (C.A.), at 615-16; *In re Calgary and Medicine Hat Land Co.*, [1908] 2 Ch. 652 (C.A.), at 659; *Markt & Co., Ltd. v. Knight Steamship Co., Ltd.*, [1910] 2 K.B. 1021 (C.A.), at 1039; *May v. Wheaton* (1917), 41 O.L.R. 369 (H.C. Div.), at 371; *Bamber v. Bank of Nova Scotia*, [1943] 4 D.L.R. 526, at 532, [1943] 2 W.W.R. 529 (Alta. S.C., App. Div.); and Williams, "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 15.

[7] *Shabinsky v. Horwitz*, [1973] 1 O.R. 745, at 751, 32 D.L.R. (3d) 318 (H.C.J.).

[8] *May v. Newton* (1887), 34 Ch. D. 347, at 349. and *Templeton v. Leviathan Proprietary Ltd.* (1921), 30 C.L.R. 34 (H.C. Aust.), at 57-58.

[9] *Wilson v. Church* (1878), 9 Ch. D. 552, at 558-59, 39 L.T. 413 (C.A.); *Watson v. Cave (No. 1)* (1881), 17 Ch. D. 19, at 21, 44 L.T. 40 (C.A.); *Fraser v. Cooper, Hall, & Co.* (1882), 21 Ch. D. 718, at 719, 48 L.T. 954; and *John v. Rees*, [1970] Ch. 345, at 371, [1969] 2 All E.R. 274.

[10] *Supra*, ch. 2, sec. 2(c)(iii)b.

(b) Rule 23

(i) Opt Out Procedure

Unlike the situation under the existing Ontario law, Rule 23 of the United States Federal Rules of Civil Procedure[11] permits class members to opt out of a class action brought under subdivision (b)(3), the provision under which most "damage" class actions are brought. By contrast, in class actions brought under subdivisions (b)(1) and (b)(2), no right of exclusion is extended to absent class members.[12] Although the right to opt out under Rule 23(b)(3) is not conferred expressly, it is implicit in the language of subdivision (c)(2), which states that the mandatory notice to be given in (b)(3) suits after certification "shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; [and that] (B) the judgment, whether favorable or not, will include all members who do not request exclusion . . .".

The right to opt out was introduced into the present Rule 23 as part of the comprehensive revision of the Rule that was undertaken in 1966. Among the most significant changes effected by this revision was that judgment in a class action brought under Rule 23(b)(3) was expressly made binding upon absent class members. Under former Rule 23, in class actions seeking damages, the so-called "spurious" class actions, which were roughly analogous to the existing Rule 23(b)(3) damage class actions, a judgment bound only those class members who actively participated in the action as parties, either as plaintiffs or intervenors. In light of its implicit requirement that class members, other than the representative plaintiff, take part in the action in order to be bound, the spurious suit was not a class action in the true sense. As a result, commentators and courts often characterized the former Rule 23(b)(3) procedure as "a permissive joinder device",[13] which accurately suggested that, although nominally a class action, the spurious class action in fact was not a representative action.

The introduction in 1966 of a general right to opt out in Rule 23(b)(3) class actions obviously created a potential for the general *res judicata* effect of the class action judgment to be undermined by individual class members exercising their right of exclusion. Moreover, a right of exclusion could detract from the stated goals of the Advisory Committee on Civil Rules, responsible for the drafting of Rule 23, that (b)(3) class actions should "achieve economies of time, effort, and expense, and promote uniformity of

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[11] Fed. R. Civ. P. 23, promulgated at 383 U.S. 1029 (1966).

[12] For a discussion of the categories under Rule 23, see *supra*, ch. 8, sec. 3(b)(i).

[13] See American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure* (1972), at 10 (hereinafter referred to as "American College of Trial Lawyers"); Comment, "The Importance of Being Adequate: Due Process Requirements in Class Actions under Federal Rule 23" (1975), 123 U. Pa. L. Rev. 1217, at 1220; Wright and Miller, *Federal Practice and Procedure* (1972), Vol. 7A, §1777, at 45; Seymour, "The Use of 'Proof of Claim' Forms and Gag Orders in Employment Discrimination Class Actions" (1978), 10 Conn. L. Rev. 920, at 929; and *Eisen v. Carlisle & Jacquelin*, 41 F.R.D. 147 (S.D.N.Y. 1966), at 149.

decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results".[14] To the extent that class members exercised their right to exclude themselves from the class for the purpose of prosecuting their individual suits, the desired economies would suffer and the possibility of inconsistent judicial holdings would increase.

It is interesting to observe that the amendment to Rule 23(b)(3) that was originally proposed would not have created an absolute right of exclusion, but would have made the right to opt out subject to a judicial discretion to deny the opportunity of withdrawal to any class member whose presence was thought essential to a fair adjudication.[15] Unfortunately, although the Advisory Committee on Civil Rules rejected this approach in favour of the existing provision, it did not explain the reasons for its preference.[16] The Advisory Committee justified the incorporation of an absolute right to opt out on the basis that individual class members might prefer to conduct their own suits, instead of relying on the class action to vindicate their claims against the defendant.[17]

A concern to protect this individual interest, in and of itself, does not, however, lead necessarily to a decision to institute an opt out, as opposed to an opt in, regime. An opt in procedure would implement the wishes of individual class members as effectively as would an opt out procedure: a decision by a person not to opt in would allow him to seek redress by bringing

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[14] Advisory Committee on Civil Rules, "Proposed Amendments to the Rules of Civil Procedure for the United States District Courts", 39 F.R.D. 69 (1966), at 102-03 (hereinafter referred to as "Advisory Committee Notes").

[15] The original proposal read as follows:

> In any class action maintained under subdivision (b)(3), the court shall exclude those members who, by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class.

Advisory Committee on Civil Rules, "Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts", 34 F.R.D. 325 (1964), at 386:

[16] Apparently, it was not required by constitutional considerations: see Note, "Developments in the Law – Class Actions" (1976), 89 Harv. L. Rev. 1318, at 1488, *n.* 186, and 1628 (hereinafter referred to as "Harvard Developments"), and Newberg, *Newberg on Class Actions* (1977), Vol. 5, Appendix Item 2, at 1491-92.

[17] In the following brief discussion, the Advisory Committee referred to this interest:

> As noted in the discussion of [Rule 23(b)(3)], the interests of the individuals in pursuing their own litigation may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request.

Advisory Committee Notes, *supra*, note 14, at 104-05.

his own action. Professor Kaplan, the former Reporter to the Advisory Committee on Civil Rules, has explained that the decision to give effect to the importance of individual interests by creating a right to opt out was based on the behavioural assumption that absent class members "will routinely ignore, or at least fail to respond to, the notices contemplated under (c)(2). On that premise, the vote went the way we see, to the effect that a non-response means inclusion rather than exclusion."[18]

Professor Kaplan also has argued that only the opt out procedure was consistent with the view that an important function of class actions is to provide a forum for persons whose individual claims are of a size that would prevent them from initiating separate actions for damages. In expressing this belief, Professor Kaplan evinced an awareness that certain economic and social barriers to litigation may discourage injured persons from obtaining compensation for otherwise meritorious claims:[19]

> If, now, we consider the class, rather than the party opposed, we see that requiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people – especially small claims held by small people – who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable. For them the class action serves something like the function of an administrative proceeding where scattered individual interests are represented by the Government. In the circumstances delineated in subdivision (b)(3), it seems fair for the silent to be considered as part of the class. Otherwise the (b)(3) type would become a class action which was not that at all – a prime point of discontent with the spurious action from which the Advisory Committee started its review of rule 23.

As indicated previously, when Rule 23 was amended in 1966 a right to opt out was not extended to class members in (b)(1) and (b)(2) class actions. It was thought that the class in these kinds of class action generally would be more cohesive, and that a judgment in an action brought by one class member necessarily would affect the rest of the class members.[20] Permitting a class member to exclude himself from the class in order to bring a separate action would make sense only if he could pursue his own suit to a conclusion that would be independent of the outcome of the class action.[21] Although, as observed earlier,[22] the influential Harvard "Developments" article has rejected the use of the so-called "categorial approach" to class actions, and has suggested that the Rule 23 classifications should be abolished, it conceded that, in the case of opting out, the categories have "at least some practical justification".[23]

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[18] Frankel, "Amended Rule 23 from a Judge's Point of View" (1966), 32 Antitrust L.J. 295, at 299.

[19] Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)" (1967), 81 Harv. L. Rev. 356, at 397-98.

[20] See Wright and Miller, *supra*, note 13, Vol. 7A, §1786, at 143-44.

[21] See Harvard Developments, *supra*, note 16, at 1348-49.

[22] See *supra*, ch. 8, sec. 3(b)(i).

[23] The following passage from Harvard Developments, *supra*, note 16, at 1487-88 (footnotes omitted), presented this argument:

In designing a class action procedure for Ontario, this Commission has eschewed a categorical approach in favour of a functional approach that focuses on the precise purposes of each element of the mechanism.[24] Thus, in deciding whether to incorporate procedures for opting out or opting in, we are obliged to consider their propriety in all kinds of class suit, including those seeking exclusively injunctive or declaratory relief.

Turning now to the procedure governing the exercise of the right to opt out under Rule 23(b)(3), it should be noted that the Rule does not specifically address this question. Although the Rule does stipulate that a class member is to exclude himself by a date specified by the court, it is silent about very fundamental matters, such as the manner in which this is to be done and the time period within which a class member must take action. Accordingly, the responsibility for developing the practical mechanics of opting out has devolved upon the courts.

In administering Rule 23(b)(3) class suits, the courts have generally taken a flexible, relatively pragmatic approach to the exercise of the right of exclusion, and have not required class members to comply with formal procedures in order to show their intention to opt out. Courts have been satisfied with a reasonable indication of a desire to take advantage of the right.[25]

> [T]he grant of opt-out rights makes sense only if the individuals removed from the class can truly be insulated from the effect of the class judgment. Thus, the distinction rule 23 draws between (b)(1) and (b)(2) classes, whose members have no right to exclude themselves, and (b)(3) classes, whose members may opt out, has at least some practical justification. Most (b)(1) and (b)(2) classes are suing for relief which cannot be readily limited to only some class members. For example, all individuals who seek to claim from a common fund are affected by a court's allocation of the fund regardless of whether they have excluded themselves from the suit. Similarly, all individuals burdened by an unconstitutional statute are affected, even if they have opted out of class litigation, if the statute is invalidated. Rule 23(b)(3) class suits, by contrast, are generally brought to recover money damages, relief which may be awarded in a manner which distinguishes among individual class members, and which therefore may be shaped to respect the rights of individuals who have excluded themselves from a lawsuit. The fact that relief is severable may be of limited significance for class members offered the opportunity to exclude themselves who, despite their disagreement with class representatives, nonetheless do wish to pursue their claims: cut off from the class, individual class members may not be able to afford the cost of litigation; moreover, the stare decisis effects of the class judgment may frustrate existing class members' attempt to litigate independently in any event. But at least for those class members whose disagreement with class representatives manifests itself in a desire not to sue, the right to leave the lawsuit may be of value.

[24] See *supra*, ch. 8, sec. 3(b)(i).

[25] See Newberg, *supra*, note 16, Vol. 2, §2475r, at 177, and Wright and Miller, *supra*, note 13, §1787, at 156. For example, in *In re Four Seasons Securities Laws Litigation*, 493 F.2d 1288 (10th Cir. 1974), at 1291, the Court stated:

> A reasonable indication of a desire to opt out ought to be sufficient . . . . [F]lexibility is desirable in determining what constitutes an expression of a class member's desire to exclude himself and any written evidence of it ought to be sufficient.

In *McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62 (N.D. Cal. 1976), at 69-71, the Court held that class members who had not requested exclusion in the prescribed manner, but who had filed their own individual suits after receiving notice of the certification of the class action prior to the termination of the exclusion period, in

The courts have adopted an equally flexible attitude to the question of the period within which class members should be required to exercise their right to opt out. The duration of the exclusion period, and whether it should be extended, rest within the discretion of the court.[26] In conformity with a general standard of reasonableness,[27] the courts have established a variety of time periods.[28] Furthermore, if a class member fails to opt out within the prescribed time limit, the court nonetheless retains a discretion to exclude him from the class.[29]

(ii) Proof of Claim

We have explained that, as drafted, Rule 23 does not oblige class members to opt in to a class action after certification in order to be bound by the judgment or to secure whatever benefits are eventually achieved by the suit. Nor does it expressly confer on the courts a discretion to impose such a requirement in the course of managing class actions. However, some courts, at least in the initial period following the 1966 amendment, engrafted such a procedure onto Rule 23. In several class actions, class members were asked to file a proof of claim or "statement of intention" as a prerequisite to later obtaining their individual shares of a monetary recovery.[30] Such action was requested either in the mandatory post-certification notice given under Rule

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effect had exercised their rights to opt out. Class members who have begun individual actions prior to the filing of a class action, however, are not excluded automatically as possible members of a class action that is eventually certified: see *Supermarkets General Corp. v. Grinnell Corp.*, 59 F.R.D. 512 (S.D.N.Y. 1973), aff'd 490 F.2d. 1183 (2d Cir. 1974).

[26] See Newberg, *supra*, note 16, Vol. 2, §2475p, at 171.

[27] *Greenfield v. Villager Industries*, 483 F.2d 824 (3d Cir. 1973), at 834.

[28] See, for example, *In re Arizona Bakery Products Litigation*, 1975-2 Trade Cases ¶60,556 (D. Ariz. 1975) (one month); *In re Franklin National Bank Securities Litigation*, 73 F.R.D. 25 (E.D.N.Y. 1976), at 30 (two months); *Werfel v. Kramarsky*, 61 F.R.D. 674 (S.D.N.Y. 1974), at 683 (two months from receipt of notice); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, (S.D.N.Y. 1975), at 116 (two months from receipt of notice); and *McCubbrey v. Boise Cascade Home & Land Corp.*, *supra*, note 25, at 69 (three months).

[29] *Supermarkets General Corp. v. Grinnell Corp.*, *supra*, note 25, at 1186.

[30] Courts have required various kinds of information to be supplied. In *Harris v. Jones*, 41 F.R.D. 70 (D. Utah 1966), at 74-75, *nn.* 9 and 10, the Court required class members to file simple statements of their claims and to give information concerning the types and sources of representations that they relied upon in purchasing securities. Class members were warned that failure to submit such statements could result in dismissal of their claims with prejudice. In *State of Minnesota v. United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968), at 577-78, the Court ordered class member government agencies to submit a proof of claim form indicating, *inter alia*, the amount and date of purchase, the use made of the steel, and the intermediate firms involved, and advised that those not complying would be "barred and excluded". In *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968), at 459 and 462, the Court affirmed the propriety of requiring class members to take affirmative action as a condition of ultimate recovery and of barring the claims of members who did not file brief statements of their intention to prove damages.

See, also, Wright and Miller, *supra*, note 13, Vol. 7A, §1787, at 157-61, and Newberg, *supra*, note 16, Vol. 2, §2475i, at 154 *et seq.*

23(c)(2)[31] or in second notices sent by the courts.[32] The courts that have employed this procedure interpreted their discretion to order a general notice under Rule 23(d)(2) as authorizing the use of such procedures in particular class actions.[33]

To support the institution of the proof of claim procedure, the courts presented a number of justifications.[34] However, these rationales often were given with so little elaboration that the underlying reasoning is elusive. Certain commentators have gone so far as to suggest that, behind the articulated reasons, lay an initial antipathy to the fundamental amendment effected by the 1966 revision of Rule 23(b)(3) – the binding effect of the judgment and the conferral of benefits on passive class members.[35]

The cases that established this *de facto* opt in procedure attached certain sanctions to a failure by class members to take affirmative action.[36] One sanction was to exclude from the class those persons who did not file proofs of claim, a measure that would prevent them from participating in an eventual class recovery, but would not preclude the prosecution of individual actions against the defendant. The other sanction imposed by the courts was to dismiss with prejudice or absolutely bar the claims of class members who failed to submit the requested documentation. Under Rule 23(b)(3), this would foreclose any relief for those class members: they could neither share in any relief that might later be awarded to a successful class nor bring their own separate actions because, in an opt out class action model, the judgment

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[31] *Philadelphia Electric Co. v. Anaconda American Brass Co., supra*, note 30; *State of Minnesota v. United States Steel Corp., supra*, note 30; and *State of Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968), at 403-04.

[32] See *Harris v. Jones, supra*, note 30, at 74, and *Lamb v. United Security Life Co.*, 59 F.R.D. 25 (S.D. Iowa 1972), at 43.

[33] See Freeman, "Procedural Problems in the Conduct of Class Actions", in Practising Law Institute, *Class Actions 1976: The Basics* (1976) 51, at 73, and Federal Judicial Center, Board of Editors, *Manual for Complex Litigation* (1978) (Clark Boardman), §1.45, at 75-76 (hereinafter referred to as "Manual").

[34] In *Philadelphia Electric Co. v. Anaconda American Brass Co., supra*, note 30, the Court stated (at 459) that filing a statement of intention to prove damages "would reveal the true scope of the litigation, and would either greatly reduce the trouble and expense of any subsequent notices which may be required, or provide a basis for informed re-appraisal of the class-action question under 23(c)(1)". The Court in *State of Iowa v. Union Asphalt & Roadoils, Inc., supra*, note 31, at 404, justified the procedure on the basis that it was "in the interests of expediency and fairness to the defendants". In *Harris v. Jones, supra*, note 30, the Court stated (at 75) that the institution of a proof of claim procedure would put the court "in a position better to determine the adequacy of the existing representation, more effectively to define the class or to establish or eliminate sub-classes, and to establish practical guides for the trial of the cases and, it is hoped, the submission of the issues for meaningful determination by a jury". "[F]airness, economy and efficiency in the administration of [the] action" were invoked by the Court in *Forbes v. Greater Minneapolis Area Board of Realtors*, 61 F.R.D. 416 (D. Minn. 1973), at 418.

[35] See Newberg, *supra*, note 16, Vol. 2, §2457q, at 174; Comment, "Party Discovery Techniques: A Threat to Underlying Federal Policies" (1974), 68 Nw. U. L. Rev. 1063, at 1073; and Note, "Requests for Information in Class Actions" (1974), 83 Yale L.J. 602, at 611.

[36] See Newberg, *supra*, note 16, Vol. 2, §2600, at 233-34.

would bind absent members of the class who did not act to exclude themselves.

It has been observed that the cases in which these procedures first were implemented were class actions involving classes consisting of governmental entities.[37] In view of the relatively sophisticated character of the class members, imposing such a requirement may not have been an unfair or onerous burden.[38] Although it would have been open to the courts to interpret the early proof of claim cases as applying only where it was clear that the class members were able to protect their interests,[39] the courts did not so restrict the procedure. For example, in subsequent cases courts required submission of proofs of claim in securities class actions where the classes were composed of numerous small investors.[40]

Later judicial decisions, however, criticized as being fundamentally inconsistent with the opt out regime of Rule 23(b)(3) the judicial incorporation through the mandatory proof of claim procedure of what is in effect an opt in requirement.[41] Among these decisions were several cases in which the

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[37] See Seymour, *supra*, note 13, at 932, and Federal Courts Committee of the Bar of the City of New York, Committee Report, "Class Actions - Recommendations Regarding Absent Class Members and Proposed Opt-In Requirements" (1973), 28 Record 897, at 898-99 (hereinafter referred to as "N.Y. Committee Report").

[38] The Federal Courts Committee of the Bar of the City of New York presented the following view of the early "proof of claim" cases:

> It is significant, although not specifically made a basis for decision in any of the three cases, that in each the class members were governmental entities, such as states, municipalities, counties, school districts, special governmental districts or other political subdivisions. Such class members could fairly be presumed to have the sophistication, the interest, the necessary supporting records, and the available legal counsel so that a request for a proof of claim would neither be misunderstood nor ignored. Thus, these decisions may not necessarily furnish support for the use of a proof of claim procedure in cases where the class is comprised of a cross-section of laymen.

N.Y. Committee Report, *ibid.*, at 898-99.

[39] In *In re Antibiotic Antitrust Actions*, 333 F. Supp. 267 (S.D.N.Y. 1971), at 271-72, the following comment invited this interpretation:

> While not required by Rule 23, and clearly inappropriate where the class is large and the individual claim small, it appears that, in this instance, the proof of claim form is a useful device . . . . The same requirement was imposed in several later cases involving similar classes of government entities.
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> These government entity cases all involved classes with readily identifiable members whose purchases can be ascertained and where claims are sufficiently large to make the expense of this procedure justifiable [citations omitted].

[40] See *Lamb v. United Security Life Co.*, *supra*, note 32, at 43; *Siegel v. Realty Equities Corp. of New York*, 70 Civ. 4338 (S.D.N.Y. 1972); and N.Y. Committee Report, *supra*, note 37, at 900.

[41] See, for example, *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974), at 340, *cert.* denied 419 U.S. 1070 (1974); *B & B Investment Club v. Kleinert's Inc.*, 62 F.R.D. 140 (E.D. Pa. 1974), at 146-51; *Korn v. Franchard Corp.*, 50 F.R.D. 57 (S.D.N.Y. 1970), at 59-60; *Robinson v. Union Carbide Corp.*, 544 F.2d 1258 (5th Cir. 1977), at 1260-61;

court requested class members to file claim forms, but advised that they would not apply any sanctions for a failure to do so.[42] The rejection of a mandatory proof of claim procedure has been so persistent as to be regarded as "the marked judicial trend".[43] In 1973, the *Manual for Complex Litigation* declared that imposing an opt in requirement in this manner contradicted the language and policy of Rule 23.[44] The view expressed in the Manual has been cited subsequently by courts that have refused to accede to requests by defendants to institute a mandatory proof of claim procedure in individual class actions.[45]

In eschewing the use of the mandatory proof of claim procedure, the courts have stated not only that it is inconsistent with the language of Rule 23(b)(3), but also that such a procedure undermines a primary policy of the Rule 23(b)(3) class suit – to facilitate the vindication of claims that would

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and *Rule v. International Association of Bridge, Structural and Ornamental Ironworkers, Local No. 396*, 568 F.2d 558 (8th Cir. 1977), at 563, *n.* 4. But see *In re U.S. Financial Securities Litigation*, 69 F.R.D. 24 (S.D. Cal. 1975), at 52-54; *Copeland v. Dunlop*, 10 E.P.D. ¶10,241 (D.C. 1975); and *Sanders v. Shell Oil Co.*, 10 F.E.P. Cases 941 (E.D. La. 1974).

[42] *Korn v. Franchard Corp., supra*, note 40, at 59-60; *In re Cohen's Will*, 51 F.R.D. 167 (S.D.N.Y. 1970), at 175; *Arey v. Providence Hospital*, 55 F.R.D. 62 (D.C. 1972), at 72; and *Unicorn Field, Inc. v. Cannon Group, Inc.*, 60 F.R.D. 217 (S.D.N.Y. 1973), at 228.

[43] Newberg, *supra*, note 16, Vol. 2, §2475i, at 155.

[44] See Manual, *supra*, note 33, §1.45, at 76-77, where the following discussion explains this conclusion:

> The notice authorized by subdivision (d)(2) is discretionary. In appropriate cases it may be used to supplement the mandatory notice requirement in (b)(3) class actions. But in a few class actions, appended to the mandatory (c)(2) notice was a 'Statement of Intention to Assert a Claim' which the addressee was required to fill out and submit if it did not wish to be excluded from the class. This amounted to a misuse of the discretionary powers conferred by Rule 23(d)(2) in violation of the 'opt-out' requirement to be observed under Rule 23. 'The ability of a member to secure the benefits of a successful termination of the action without affirmatively pressing his own claim is particularly important because it assures that small claimants who would be unable to protect their rights through separate suits can take advantage of the judgment in the class action without the burden of actually participating'. According to the weight of recent decision, this right of the small claimant to benefit without alone bearing the otherwise prohibitive cost of litigation is the most important procedural right secured by Rule 23. The requirement of 'opting-in' must, therefore, under Rule 23 as it is presently written, be regarded as a clear abuse of discretion. Requiring a proof of claim prior to adjudication or settlement under pain of exclusion or dismissal is the same thing as requiring class members to opt in. After class certification, in appropriate circumstances, it may be desirable to inquire of class members concerning financial or transactual data. However, failure to respond to such inquiry should not be cause for exclusion from the class. There is authority in cases in which the information is not otherwise available for requiring class members to file a proof of claim or take other affirmative action after adjudication or settlement as a prerequisite to direct participation in the distribution to class members [citations omitted].

[45] See, for example, *Ostroff v. Hemisphere Hotels Corp.*, 60 F.R.D. 459 (S.D.N.Y. 1973), at 462; *Sirota v. Econo-Car International, Inc.*, 61 F.R.D. 604 (S.D.N.Y. 1974), at 608; *Byrnes v. IDS Realty Trust*, 70 F.R.D. 608 (D. Minn. 1976), at 614; and *In re Fertilizer Antitrust Litigation*, 1979-2 Trade Cases ¶62,894 (E.D. Wash. 1979), at 79,179-80.

otherwise not be compensated due to their small size and the unsophisticated nature of the class members.[46]

3. CHOICES FOR ONTARIO

In deciding whether, and the extent to which, the consent of individual class members to litigation on their behalf should be required under the proposed *Class Actions Act*, we have considered four alternative procedures. These are the following: (1) a "true" opt in procedure, which would require class members to take affirmative action following certification to include themselves in the class; (2) an "opt out" procedure in which no affirmative action on the part of class members would be needed in order to be bound by the judgment, but which would allow the court to require class members in effect to "opt in" by filing proof of claim forms or other information before the trial of the common questions as a prerequisite to securing relief in a successful action; (3) an opt out procedure in which no affirmative action would be required in order to be bound by the judgment, but which would allow class members to exclude themselves in all cases; and (4) an opt out procedure that would give the court a discretion to decide whether a right of exclusion should be extended to some or all of the class members. We shall deal initially with the first two alternatives, both of which are a type of opt in procedure, as they require affirmative action on the part of absent class members prior to the determination of the common questions.

(a) An Opt In Regime

In the United States, there have been proposals to change the fundamental opt out character of Rule 23(b)(3) by requiring affirmative action on the part of class members after certification. The recommendations have been of two types: either to impose a "true" opt in class procedure in respect of Rule

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[46] For example, in *B & B Investment Club v. Kleinert's Inc., supra*, note 41, the Court expressed this view (at 148-50):

> The fundamental structure of the (b)(3) class action under Rule 23 is that all class members are bound who do not request exclusion. We believe that it is implicit in the adoption of that procedure, and we agree with the Courts that have so held, that one of the purposes of Rule 23 is to provide a forum to small claimants who, absent this device, would fail to act to affirmatively press their claims . . . . The express incorporation of the opt-out procedure without an opt-in provision implements that objective. We also think that the corollary behavioral premise that small claimants will more likely take affirmative action to recover when and if liability and/or a recovery fund is established is correct.
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> . . . .
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> This case presents a relatively small class action based on violation of the securities laws. It appears that the policy of providing a forum to small claimants is clearly applicable to this case. The dual notice and proof of claim procedure would be confusing and, with the provision for barring from any recovery those who do not respond, is at least arguably inconsistent with the provision for the inclusion of those class members who do not expressly request exclusion [citations omitted].

See, also, *Korn v. Franchard Corp., supra*, note 41, at 59-60.

23(b)(3) class actions, or to effect an amendment to Rule 23(b)(3) that would give courts a discretion to order the filing of proof of claim forms or other documents after certification as a prerequisite to later participation in a class recovery.[47] As we have explained earlier, of these proposals, implementation of the second would have the more serious consequences for absent class members because, in the event of a failure to respond, a person would not only be unable to obtain his share of monetary relief, but also would be prevented from initiating his own action against the defendant.

In support of these proposals, four arguments have been advanced. First, it has been contended that both the institution of a "true" opt in regime, and requiring the submission of proof of claim forms, will remove from a class action those class members who are not interested in the action. Secondly, it has been asserted that a "true" opt in procedure is preferable to an opt out regime because the latter, by automatically including class members within the class, in effect obliges them to sue the defendant, thereby interfering with their freedom of choice. Thirdly, it has been argued that, in an opt out class action, the submission of proof of claim forms by absent class members will reveal the amount of monetary relief for which the defendant may be liable, and will afford him the information necessary to permit him to engage in settlement negotiations. The fourth argument has been that an opt in requirement will make class actions more manageable. We find each of these arguments wanting.

The suggestion that a class member should be required to indicate his interest in a suit brought on his behalf carries a certain superficial appeal that obscures the dramatic consequences that would flow from its acceptance.[48] On first impression, it seems an ideal mechanism to establish that class members not only favour the class action, but also wish to participate in it. If a failure to act signifies that class members oppose or are uninterested in the class action, or indicates that they have not been harmed or regard their injuries as unimportant, there would seem to be little reason to seek to ensure that class members receive the tangible benefits of the class action.

It is questionable, however, whether the basic assumption underlying this perception is correct. To a great extent, acceptance of this argument depends on the belief that a failure to act reflects a deliberate, informed decision by the silent class members. Only if this premise is valid would it be justifiable to

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[47] See American College of Trial Lawyers, *supra*, note 13, at 32-34, and American Bar Association, Committee on Class Actions of the Section of Corporation, Banking and Business Law, "Recommendation Regarding Consumer Class Actions for Monetary Relief" (1974), 29 Bus. Law. 957, at 959 and 968-69 (hereinafter referred to as "A.B.A. Committee").

[48] Typical of this argument is the following passage from the A.B.A. Committee, *ibid.*, at 968:

> Under [Rule 23(b)(3)], there always exists the potentiality of crowding huge numbers of people into mass litigation as a result of their inaction. In many instances, class members are totally devoid of interest and have no desire to participate. It is doubtful, in fact, that a large proportion will ever file proofs of claim. Nevertheless, the presence of the class, established by inaction rather than interest, can be a powerful pressure towards settlement, regardless of the merits of the case.

deny the advantages of a class action to non-responding class members, particularly those with claims that are not sufficient to support the expense of individual litigation.

It is interesting to note that certain proponents of affirmative action are of the view that the purposes of the class action procedure are limited to the achievement of economies of time, effort, and expense, and the fostering of uniformity in judicial decision-making. In other words, they are not willing to ascribe to class actions an "access" function.[49] A corollary of this view is the belief that only individually recoverable claims merit prosecution through the class action, because they represent injuries that otherwise might lead to separate actions, which in turn would lead to inefficient use of resources by the courts and litigants, and would pose the danger of inconsistent decisions. It follows, then, that an opt out regime would be objectionable because it would allow redress for individually nonrecoverable claims that, by definition, would not have been brought as individual suits.

We do not find this argument persuasive. We do not agree that a failure to respond to an invitation to opt in to a class action necessarily demonstrates indifference to the harm inflicted by the defendant. In our view, many injured class members would inevitably fail to opt in for reasons having no relation to either their subjective intention or their sense of harm. The Commission believes that the operation of the same social and psychological factors that discourage persons from bringing their own civil actions will prevent them from taking other forms of affirmative action, particularly following certification, when the liability of the defendant is not settled and recovery appears to be in the distant future.[50] Furthermore, the fact that class actions might be used to achieve compensation for persons having claims too small to justify individual actions does not trouble us. On the contrary, we believe that this represents an important benefit of class actions.[51]

As indicated, the second argument advanced in favour of an opt in, as opposed to an opt out, regime is that the latter violates the principle of individual choice. It is argued that whether to sue for a private harm and how the suit should be conducted, including the selection of counsel, have long been matters of personal preference. To bind a class member automatically to a result secured by a self-appointed guardian would derogate from this principle.

A fundamental problem with this argument is that its relevance is restricted to injured persons having individually recoverable claims that will allow them the luxury of choosing whether or not to sue the defendant. For persons having claims for smaller amounts, an opt out regime cannot be

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[49] See, for example, Pollock, "Class Actions Reconsidered: Theory and Practice Under Amended Rule 23" (1973), 28 Bus. Law. 741, at 741-43; American College of Trial Lawyers, *supra*, note 13, at 5-6; and Federal Courts Committee of the Bar of the City of New York, Minority Report, "Class Actions - Recommendations Regarding Absent Class Members and Proposed Opt-In Requirements" (1973), 28 Record 897, at 908-09.

[50] See Moore, "The A.B.A., The Congress and Class Actions: A Report" (1974), 3 C.A.R. 36, at 53-54, and N.Y. Committee Report, *supra*, note 37, at 905.

[51] See *supra*, ch. 4, sec. 3(a)(ii).

criticized on this basis, because they could not sue the defendant in any event. Rather than deprive them of choice, the opt out class action affords them compensatory redress otherwise unattainable due to insurmountable economic obstacles.

In our view, the incorporation of an opt in procedure is not necessary to allay concerns that, under the proposed *Class Actions Act*, class members should not, in effect, be forced to sue the defendant by making them subject to a judgment in cases where they would prefer not to sue. A concern not to include class members against their will could be addressed by an opt out procedure that would give adequate recognition to this interest. Even if the proposed *Class Actions Act* were to create a right to opt out and dissident class members failed to take advantage of it, they still could indicate their opposition at a later stage of the action by not attempting to claim their shares of any monetary relief, if some action on their part were necessary, or by returning or not cashing any cheque sent to them.

The third argument that has been advanced in support of opting in is that such a requirement is necessary in order to give defendants information that will enable them to participate in settlement negotiations. An opt in procedure, it has been suggested, will provide an accurate picture of a defendant's potential liability to the class by indicating the number and aggregate amount of the claims that will be made by the class members. It is asserted that without this information the defendant will be at a disadvantage in his attempts to negotiate a settlement with the class plaintiff.[52]

The thrust of this argument appears to be that, in an opt out type of class action, where class members are included without any affirmative conduct on their part, defendants cannot predict with sufficient accuracy how many members of the class eventually will file individual claims for damages. In a class action requiring absent class members to opt in after certification, by contrast, defendants would be better able to estimate the number of class members who are likely to file claims if the defendant is found liable, based on the fact that they already have evinced an interest in the litigation. Moreover, the proof of claim procedure would establish the maximum liability of the defendant.

Again, we perceive weaknesses in this argument. First, it should be observed that the argument neglects to mention the fact that an opt in procedure makes the potential liability of the defendant more certain at the expense of excluding possibly valid claims. Secondly, although one can assume that a greater number of class members who have opted in will assert claims – since they have responded once already – the defendant nonetheless is left with an imperfect estimate of his ultimate liability.[53]

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[52] This argument was presented by the defendant in *B & B Investment Club v. Kleinert's Inc.*, *supra*, note 41, at 146 and 149.

[53] Even if the class action procedure were to require class members to opt in to the class, a defendant would be uncertain about the maximum liability to which he might be exposed, as he would be subject to being sued in individual actions that may be brought within the limitation period.

Finally, this argument assumes that a defendant can estimate his potential liability only by totalling the awards of monetary relief to individual class members, and that an aggregate assessment of the total liability of the defendant to the class, without proof by each class member, is either impossible or undesirable.[54] If a defendant could be held liable for the total amount of monetary relief to which the class would be entitled, the number of discrete claims that may be asserted ultimately would be irrelevant to his settlement strategy.[55] In chapter 14, we shall recommend that the new Ontario class action procedure should permit a court, in appropriate cases, to order that the total amount of monetary relief for which the defendant is liable be assessed as a common question.[56] Where the prerequisites for such an aggregate assessment exist, it is also probable that the defendant will be able to determine the amount with reasonable accuracy. In fact, in many cases, the necessary information will likely be available in the records of the defendant.

The suggestion that an opt in requirement would render class actions more manageable has been made by the American College of Trial Lawyers, which, unfortunately, did not explain how this result would follow.[57] In chapter 9,[58] when we discussed the "superiority" test, we explained that, in a class action brought under Rule 23(b)(3) of the United States Federal Rules of Civil Procedure, the court must find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy". Among the four matters expressed to be pertinent to a finding of superiority is "(D) the difficulties likely to be encountered in the management of a class action". Consideration of this factor has focused principally upon the presence of individual issues that will require the conduct of separate trials for each class member. Whether individual issues will be involved in the total resolution of a class action will depend upon the nature of the cause of action and the particular circumstances of the case. Forcing class members to opt in on pain of dismissal of their claims will not alter the fact that, in order to determine the liability of the defendant to individual class members, individual issues will have to be adjudicated in proceedings subsequent to the determination of the common questions in favour of the class.

Of course, to the extent that the employment of an opt in requirement will result in the exclusion of those class members who fail to respond to notice advising them of the necessity to file certain documentation, the number of separate trials will diminish. We do not doubt that fewer trials of individual issues would lessen the administrative burden imposed upon the court system; however, we do not believe that manageability should be achieved at the cost of denying compensation for meritorious claims.[59]

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[54] For a discussion of the concept of aggregate assessment, see *infra*, ch. 14, sec. 3.

[55] Moore, *supra*, note 50, at 53, *n.* 88.

[56] See *infra*, ch. 14, sec. 3(b)(vi).

[57] American College of Trial Lawyers, *supra*, note 13, at 33-34.

[58] See *supra*, ch. 9, sec. 2(a)(iv).

[59] The Senate Study made the following comment about the effect of an opt in requirement:

Moreover, if the claims of the individual class members were large, they probably would either take the necessary action to remain in the suit or commence their own actions. As a result, the number of separate trials would be unaffected by the incorporation of an opt in requirement; the class action, then, would be rendered no more manageable.[60]

Finally, we would like to emphasize that, in our view, the institution of a "true" opt in procedure would result in the creation of a procedure that is not a class action at all. Like several American commentators, we would characterize a procedure that obliges each class member to join the action after certification as merely a "permissive joinder device".[61]

Of the several class action statutes and proposals that we have reviewed, only the proposals of the Office for Improvements in the Administration of Justice of the United States Department of Justice[62] would allow the court to order class members to opt in to the class after certification. This discretion, moreover, was intended to be exercised in very narrow circumstances.

The two Bills proposed by the Office for Improvements in the Administration of Justice provided that, in a class compensatory action,[63] the court should be given a discretion to decide whether some or all of the members of the class should be required to opt in or should be allowed to opt out.[64] In determining whether to require absent class members to take measures to include themselves in the action, the court was enjoined to consider two factors relating to the ability of class members to conduct their own separate actions. These factors were "whether there is a substantial likelihood that (A) the amount of their injury or liability makes it feasible for them to pursue their interests separately; and (B) they have sufficient resources, experience, and sophistication in business affairs to conduct their own litigation".

> There is little doubt that the opt in procedure is an effective device for reducing class sizes. If, however, this reduction is accomplished at the expense of denying people a legal remedy simply because they fail to comprehend their affirmative duty or are fearful of taking action, then such a procedure must be questioned.
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> "District of Columbia Study", in Senate Study, *supra*, note 3, at 19.

[60] See "Responses to The Rule 23 Questionnaire of the Advisory Committee on Civil Rules" (1978), 5 C.A.R. 3, at 20-21, and Note, "Requests for Information in Class Actions" (1974), 83 Yale L.J. 602, at 611-14.

[61] See *supra*, note 13 and accompanying text.

[62] A Bill To provide for the reform of class action litigation procedures, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill S. 3475, 95th Cong., 2d Sess. (1978) (hereinafter referred to as "O.I.A.J. Bill S. 3475"), and Small Business Judicial Access Act of 1979, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill H.R. 5103, 96th Cong., 1st Sess. (1979) (hereinafter referred to as "O.I.A.J. Bill H.R. 5103"). See, also, draft legislation under consideration by a committee of the American Bar Association, Section of Litigation, *Proposed Class Action Legislation* (tentative draft, May 1980).

[63] See *supra*, ch. 6, sec. 1(a)(iv).

[64] O.I.A.J. Bill S. 3475, *supra*, note 62, §3013(e), and O.I.A.J. Bill H.R. 5103, *supra*, note 62, §3022(e). For a critique of the O.I.A.J. approach to the opt out/opt in issue, see "The Justice Department Class Action Legislative Proposals" (1980), 6 C.A.R. 2, at 32.

Apparently, these criteria were intended to restrict opting in to class members who had substantial injuries that would justify the expense of litigation. The rationale behind the power to impose an opt in requirement was not to exclude the claims of passive class members, but to protect individuals with large claims from any prejudice that might ensue if the class action was not prosecuted skilfully.[65]

We question, however, whether it is necessary to incorporate a right to opt in in order to protect this interest: a class member anxious to bring his own action could exclude himself from the action under an opt out regime. Certainly, a class member who satisfies these two criteria would be as able to exclude himself from an action as to include himself in a suit.

Apparently, it was envisaged by the drafters of the O.I.A.J. proposals that the courts would require class members to opt in to a class action only if their claims were unusual, or very substantial, "in the neighbourhood of $10,000".[66] As drafted, however, the proposed statute did not impose any such specific limitation. While the application of the recommended criteria was intended to restrict the exercise of the discretion of the court to cases where claims were very large, interpretation of these criteria by a court in a particular case could result in the exclusion of a person having a claim that would not justify the prosecution of an individual action.[67]

In our view, the incorporation of an opt in requirement, whether through the institution of a "true" opt in procedure or by allowing the court to require

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[65] That this indeed was the underlying concern is evident from the following passage quoted in the Commentary to Bill H.R. 5103:

> A person so apprised may be required either to opt out or opt into the action by notifying the court of his preference. Before imposing an opt-in requirement, the court must determine the likelihood that the size or kind of individual claims would make it 'feasible for [these individuals] to pursue their interests separately,' and whether they are likely to have the business sophistication and resources to conduct their own litigation.
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> Only individuals with large stakes, in the neighbourhood of $10,000, or unusual claims or defenses, will be required to opt-in. They should be accorded greater protection from inadequate representation, since the larger or more unique the interest, the greater the impetus to pursue a different litigation path. Such persons are also more likely to consult counsel and to reach a fully informed decision than those with smaller claims.

United States Department of Justice, Office for Improvements in the Administration of Justice, *H.R. 5103 - Bill Commentary: The Case for Comprehensive Revision of Federal Class Damage Procedure* (1979), at 50 (footnotes omitted).

[66] *Ibid.*

[67] Section 3004(b) of the tentative draft of the *Proposed Class Action Legislation, supra*, note 62, under discussion by a committee of the Section of Litigation of the American Bar Association, generally provides for an opt out regime, except for class members whose claims "can reasonably be expected to exceed the sum of $10,000". If the defendant elects to identify these class members, the court will be obliged to send notice to them, advising them that they will be excluded from the class unless they opt in. The decision to institute an opt out regime, subject to a narrow opt in exception, was based on a view that a fundamental purpose of the class action procedure is to facilitate compensation for individually nonrecoverable claims.

mandatory proofs of claim, would be fundamentally inconsistent with the access to justice rationale that we have endorsed as a basic justification for an expanded class action procedure in Ontario. Therefore, this Commission is of the opinion that individual class members should not be obliged to take affirmative action after certification in order to include themselves in the class action. Since we believe that the meaning of silence is equivocal, and does not necessarily indicate indifference or lack of interest, class members should not be denied whatever benefits are secured by the class action by failing to act at this stage of the proceedings. To the extent that one believes that individual interests should be afforded recognition in a class action procedure, this can be effected by the incorporation of an opt out procedure, the operation of which will not prejudice the less sophisticated members of the class. Consequently, it is the recommendation of this Commission that the proposed Ontario *Class Actions Act* should neither require class members to opt in to class actions after certification nor permit the imposition of a proof of claim procedure in the exercise of the court's discretion to administer class suits or to send notice to the class.[68]

(b) An Opt Out Regime

Having rejected an opt in regime for the proposed *Class Actions Act*, it remains to be considered whether, and to what extent, class members should be permitted to exclude themselves from a class suit. This requires an exploration of two issues. First, there is the threshold question whether class members should be given an opportunity to opt out of class actions at all. Secondly, if sound policy reasons do favour allowing class members to withdraw from a class action, there is the further issue whether there should be a general right, available in all class suits, or whether the right to opt out should be subject to judicial discretion.

Before we begin our consideration of these issues, we should reiterate our awareness that the existence of a right of exclusion would constitute a factor favouring the distribution of some form of notice to the class. Since any type of notice will involve costs and administrative burdens, we are loath to require that notice be given when it is not necessary. If an opportunity to opt out of the class were superfluous in certain circumstances, notice for this purpose would be unnecessary, thereby reducing the expense and complexity of the class action.

In determining whether class members should be permitted to withdraw from class actions, we shall consider first the reasons why a class member might wish to exclude himself. There would appear to be two such reasons. First, as the Advisory Committee on Civil Rules that drafted Rule 23 has acknowledged,[69] a class member might wish to withdraw from the class in order to bring his own separate action against the defendant. Secondly, a class member might simply prefer not to sue the defendant at all.

In our view, each of these possible motives for exclusion reflects a

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[68] See Draft Bill, ss. 18(1) and 20.

[69] See *supra*, note 17 and accompanying text.

legitimate concern on the part of individual class members that should be recognized in the proposed *Class Actions Act*, unless there are sound countervailing policy reasons. We do not believe, however, that the incorporation of a general right to opt out is necessary in all class actions. Rather, we are of the view that these individual interests will be accorded sufficient protection if the proposed *Class Actions Act* gives the court a discretion to decide whether, in a particular class suit, some or all of the members of the class should be accorded a right to withdraw from the action.

In this respect, we differ from the drafters of Rule 23. The treatment of opting out in Rule 23 reflects the so-called "categorical approach" to class actions. As we have pointed out, opting out is automatically available to all class members in class actions brought under Rule 23(b)(3), which is the subdivision under which class actions seeking damages usually are brought. By contrast, there is no right of exclusion in class actions brought under Rule 23(b)(1) and Rule 23(b)(2), those subdivisions of the Rule under which class actions seeking injunctive or declaratory relief ordinarily are prosecuted. While we do agree that the propriety of extending a right of exclusion depends, in part, upon the type of class action that is asserted, we have earlier rejected a categorical approach to the design of a class action procedure in favour of a functional analysis that looks to the underlying purposes of each of the possible constituent elements of the mechanism. It is this approach to the issue of opting out that has led us to our conclusion that a discretionary approach is to be preferred. Our reasoning is as follows. The first reason supporting a right to opt out – that a class member may wish to prosecute his claim in an individual action – does not, in our opinion, justify affording the class members a right of exclusion in all cases. When the claims of the class members are not individually recoverable, by definition, it would not be economically feasible for them to sue the defendant independently.[70] In such cases, the purported interest in bringing an individual action is only theoretical, and the extension of a right to opt out, therefore, will be no more than a gratuitous gesture. In deciding whether class members should be allowed to opt out, it would make sense, then, to consider the amounts of their individual claims.

Furthermore, a right to opt out would be meaningless in a case where, as a practical matter, a class member would be affected by a judgment notwithstanding his withdrawal from the class action. His interest is not "individual" in the sense that, by leaving the class and by bringing a separate action, he can effect a result different from that which would ensue had he remained a class member. There seems to be little reason in such circumstances to permit class members to opt out. In this respect, the failure of Rule 23 to extend a right to opt out to class members in actions seeking injunctive or declaratory relief is a sensible policy decision, as the class members might be affected by the judgment in any event.[71]

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[70] See Homburger, "State Class Actions and the Federal Rule" (1971), 71 Colum. L. Rev. 609, at 637; Newberg, *supra*, note 16, Vol. 5, Appendix Item 2, at 1491-92; Wright and Miller, *supra*, note 13, Vol. 7A, §1786, at 149; and Fisch, "Notice, Costs, and the Effect of Judgment in Missouri's New Common-Question Class Action" (1973), 38 Mo. L. Rev. 173, at 199-200.

[71] In the case of an injunction, class members clearly would be affected by an order of the

The second possible reason for exclusion similarly does not support a general right to opt out. If a class member does not wish to sue the defendant, his dissent can be accommodated easily within the structure of any class action for monetary relief. In order to avoid forcing class members to participate in a recovery, which in effect would compel them to sue the defendant, it is not necessary to grant them an opportunity to withdraw from the class, with its concomitant notice requirement. Rather, a class member who prefers not to sue need not pursue his individual share of the recovery; he may simply decline to take the necessary action after a determination of the common questions.[72]

Accordingly, the Commission recommends that the proposed Ontario *Class Actions Act* should contain a provision giving the court a discretion in all cases to determine whether class members should be permitted to exclude themselves from a class action. A person who excludes himself from a class action should no longer be a member of the class for any purpose and should not be entitled to any relief awarded in the class action.[73] It is our expectation that ordinarily the court would consider the opt out issue at the certification hearing.[74]

The overall policy underlying our opt out procedure is to acknowledge the importance of the individual interests that we have described. We do not believe, however, that the existence of individual interests should be dispositive of the issue of whether a right to opt out should be extended to class members in a particular case. Even if the court finds that there is a cognizable interest in withdrawal from the action, it should be able, in our opinion, to deny class members a right to opt out if it believes that these individual interests are outweighed by the desirability of securing a broad binding effect for the judgment, or by the public interest in achieving judicial economy and consistency of judgments.

In order to afford proper guidance to the courts in making the decision whether to permit opting out, we further recommend that the proposed *Class*

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court. Whether a class member would be affected by a declaration would depend upon the type of declaration sought in the particular case. For example, where a court makes an order declaring a legislative provision *ultra vires*, a class member would be affected, irrespective of his desire to opt out of the suit.

[72] See Fisch, *supra*, note 70, at 200. If monetary relief is distributed by the court or by the defendant without the participation of the class, a class member can return the cheque or refuse to cash it: see Moore, "The Potential Function of the Modern Class Suit" (1973), 2 C.A.R. 47, at 61, *n.* 112.

[73] See Draft Bill, s. 20(1) and (5).

[74] Exceptionally, the opting out issue may arise at a subsequent stage of the class proceedings. If, for example, the description of the class were amended after certification to include persons not previously part of the class, the court might wish to consider whether the new class members should be permitted to exclude themselves.

Ordinarily, the opt out issue would be determined by the court based on the arguments of counsel for the class and counsel for the defendant. If the court wished to hear further submissions from the class members or to secure additional information concerning whether a particular case was an appropriate case for opting out, it could invite submissions in a notice sent to the class.

Actions Act should set out certain criteria that the court should be required to consider.[75] We turn now to discuss these factors.

The first factor that we recommend a court should be required to consider is whether the judgment in the class action, as a practical matter, would affect class members even if they were to exclude themselves.[76] In class actions seeking exclusively injunctive or declaratory relief, this often would be the case, and consideration of this factor generally should lead the court to decline to allow absent class members to opt out.

The amount of the individual claims is also a critical factor in determining whether class members should be permitted to exclude themselves. If the claims are not sufficiently large to justify the expense of independent litigation, the purported individual interest in a right to opt out may well be illusory. If, on the other hand, the individual claims are individually recoverable, there might be a real interest in pursuing independent redress that would favour allowing some or all class members to exclude themselves. Accordingly, we recommend that the court, in determining whether class members should be permitted to opt out, should be required to consider whether the claims of the class members are so substantial as to justify independent litigation.[77]

The third factor that we recommend a court should be obliged to consider is whether there is a likelihood that a significant number of class members would desire to exclude themselves from the action.[78] While we believe that the proposed *Class Actions Act* should take into account individual choice, nevertheless this factor often will not be of major importance: if the court is given sufficient information at certification to identify a dissident faction within the class, it may be able to define the class so as to exclude its constituents.[79]

The fourth factor that we recommend a court should be required to weigh in making the opt out determination is the cost of notice necessary to inform members of the class of the class action and of their right to exclude themselves from the action.[80] We have included this criterion in recognition of the fact that a decision to allow class members to opt out of the class necessarily will have financial implications, because it will favour the

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[75] See Draft Bill, s. 20(2).

[76] *Ibid.*, s. 20(2)(*a*).

[77] *Ibid.*, s. 20(2)(*b*).

[78] *Ibid.*, s. 20(2)(*c*).

[79] See Harvard Developments, *supra*, note 16, at 1485-87. In order to permit the court to ascertain the wishes of the class, and whether members desire exclusion, notice might be sent to a sample portion of the class. Such notice may be given under the authority of the general notice provision: see *infra*, ch. 13, sec. 4(c). Notice for this purpose would not be necessary in all cases. For example, independent evidence of the existence of grounds for believing that class members will wish to opt out may be available. The defendant may seek to adduce this information because it might reduce the amount of his liability.

[80] See Draft Bill, s. 20(2)(*d*).

distribution of a form of notice: expense and administrative burdens will inevitably attend such notice. The Commission is of the opinion that, in deciding whether to allow class members to opt out, the court should be instructed specifically to balance the cost and inconvenience of notice against the individual interest in withdrawal from the suit. If the latter interest is outweighed, a right of exclusion should not be extended. We believe that this would be the case where, for example, the claims are not large and the cost of notice is too great for the class representative to bear, thus forcing the abandonment of the class action. To extend a right of exclusion in such circumstances would have the practical effect of denying compensation to persons with individually nonrecoverable claims who, without the class action, would receive no relief at all.

As indicated, it is our view that, in appropriate circumstances, a court should be able to deny a right of exclusion to persons who may have an interest in opting out. Therefore, we recommend that the final factor to which the court should direct its attention is the desirability of achieving judicial economy, consistent decisions, and a broad binding effect of the judgment on the questions common to the class.[81]

It should be observed that, of the proposed and existing class action mechanisms that we have studied, none has taken the discretionary approach to opting out that we have recommended. Each of the Illinois Civil Practice Act,[82] Professor Williams' Model Consumer Class Actions Act,[83] the Draft Bill for a Class Actions Act proposed by the Law Reform Committee of South Australia,[84] the proposed competition legislation, Bill C-42[85] and Bill C-13,[86] and the class action provisions of the Quebec *Code of Civil Procedure*,[87] creates a right of exclusion, exercisable by the entire class, regardless of the nature of the relief sought by the class suit. The Uniform Class Actions Act[88] adopts an approach similar to that of Rule 23, making the availability of the right of exclusion depend upon the category of the class action.

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[81] *Ibid.*, s. 20(2)(*e*).

[82] Illinois Civil Practice Act, Ill. Ann. Stat. ch. 110, §57.5(b) (Smith-Hurd 1981 Supp.).

[83] Williams, "Model Consumer Class Actions Act", in "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 65, ss. 3(6)(d) and 7(1).

[84] Law Reform Committee of South Australia, "Draft Bill for a Class Actions Act", in *Thirty-sixth Report Relating to Class Actions* (1977), at 12, ss. 3(7)(*d*) and 7(1).

[85] *An Act to Amend the Combines Investigation Act*, Bill C-42, 1977 (30th Parl. 2d Sess.), ss. 39.12(5)(*d*) and 39.17(1) (hereinafter referred to as "Bill C-42").

[86] *An Act to Amend the Combines Investigation Act*, Bill C-13, 1977 (30th Parl. 3d Sess.), ss. 39.12(5)(*d*) and 39.15(1) (hereinafter referred to as "Bill C-13").

[87] *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, arts. 1005, 1006(e), 1007, and 1027, as enacted by S.Q. 1978, c. 8, s. 3 (hereinafter referred to as "C.C.P.").

[88] National Conference of Commissioners on Uniform State Laws, Uniform Class Actions Act, Uniform Laws Ann. (1975), Vol. 12 (Cum. Supp. 1981), at 20, §8. For commentary, see Alpert, "The Uniform Class Actions Act: Some Promise and Some Problems" (1979), 16 Harv. J. Legis. 583, at 609-15.

Despite the fact that the approach that we have adopted has not been proposed or implemented elsewhere, a discretionary approach to opting out has been urged by several commentators in the United States as a replacement for the absolute right of exclusion conferred by Rule 23(b)(3).[89] For the reasons indicated above, we believe that this is the correct approach.

Before leaving the opt out issue, we would like to direct our attention to three ancillary matters. First, once the court decides that the case before it is a proper one for exclusion, class members will have to exercise the right to opt out. With respect to the manner of exercising this right, the Commission is divided. A majority of the Commission recommends allowing class members to withdraw from the class simply by informing the court of their wishes in writing, as this would allow class members to leave the class in an inexpensive, expeditious manner.[90] A minority of the Commission is of the view that class members who wish to opt out should be required to come forward and make submissions to the court, indicating the reasons for their desire to exclude themselves.

Secondly, we are of the opinion that, if a right to opt out is extended, and is exercised by some or all of the class members, this fact should be recorded. Consequently, if a class member who has withdrawn from the class action were to initiate his own suit, he could invoke the record if the defendant alleged that he did not opt out and was bound by the class judgment. On the other hand, a class member who has remained in the class might commence an individual action in the hope, for example, of securing a second recovery. A defendant seeking to rely on the *res judicata* effect of the prior class suit could present the list of exclusions as an indication of the class member's failure to opt out of the earlier action. Accordingly, the Commission recommends that the judgment on the common questions or any settlement of the action should set out the names of persons who have excluded themselves from the action.[91]

Thirdly, we note that certain class action mechanisms have addressed the problem that can arise where a class member has previously instituted a separate suit against the defendant asserting the same cause of action as is the foundation of a subsequent class action. Article 1008 of the Quebec *Code of Civil Procedure*[92] provides that, in these circumstances, the class member shall be deemed to have requested exclusion from the class if he has not discontinued his earlier suit. Bill C-42[93] and Bill C-13[94] take a slightly different

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[89] See Fisch, *supra*, note 70, at 216-17; Harvard Developments, *supra*, note 16, at 1627-28; Homburger, *supra*, note 70, at 652; and Newberg, *supra*, note 16, Vol. 5, Appendix Item 2, at 1491-92. The Kansas class action rule, Ks. Code Civ. Pro. 60-223 (1969), authorizes the court to prohibit class members from opting out of a (b)(3) class action where it "finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor".

[90] See Draft Bill, s. 20(3).

[91] *Ibid.*, s. 20(4).

[92] C.C.P., *supra*, note 87.

[93] Bill C-42, *supra*, note 85, s. 39.17(2).

[94] Bill C-13, *supra*, note 86, s. 39.15(2).

approach, providing that the person against whom the class action was certified may apply to the court to exclude the class member as if he had exercised his right to opt out. We agree that it would be unfair to allow a class member to recover twice for an injury arising out of a single transaction and that the class member should be obliged to choose between relying on the class action and pursuing an independent action. In our view, however, this matter need not be addressed in the proposed *Class Actions Act*, as the defendant may apply to the court to exercise its discretion to stay the earlier action,[95] a matter considered in chapter 11.[96]

Recommendations

The Commission makes the following recommendations:

1. The proposed Ontario *Class Actions Act* should neither require class members to opt in to a class action after certification nor permit the imposition of a proof of claim procedure in the exercise of the court's discretion to administer the class suit or to send notice to the class.

2. The proposed Ontario *Class Actions Act* should give the court a discretion in all cases to determine whether class members should be permitted to exclude themselves from a class action.

3. The proposed *Class Actions Act* should specify that the court, in determining whether to grant a right to opt out to some or all of the class members, should be required to consider, *inter alia*, the following criteria:

   (a) whether as a practical matter members of the class who exclude themselves would be affected by the judgment;

   (b) whether the claims of the members of the class are so substantial as to justify independent litigation;

   (c) whether there is a likelihood that a significant number of members of the class would desire to exclude themselves;

   (d) the cost of notice necessary to inform members of the class of the class action and of their right to exclude themselves; and

   (e) the desirability of achieving judicial economy, consistent decisions, and a broad binding effect of the judgment on the questions common to the class.

4. Where the court has determined that some or all of the members of the class may exclude themselves, class members should be able to exercise this right by informing the court in writing, by a date specified by the court, of their desire to do so.

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[95] *Judicature Act*, R.S.O. 1980, c. 223, s. 18.6.

[96] *Supra*, ch. 11, sec. 3(b)(iii).

5. The names of persons who have excluded themselves from a class action should be set out in any judgment on the questions common to the class or in any settlement of the action.

CHAPTER 13

NOTICE

1. INTRODUCTION

Although, to this juncture in the Report, we have discussed notice in connection with our consideration of other topics, we have yet to examine this important issue as a discrete matter. This will be the purpose of the present chapter.

As a matter of first impression, it may not be evident why the issue of notice merits separate attention in this Report. The reasons are simple. First, notice to members of the class may serve a number of purposes. Notice is a useful means of ensuring that the interests of class members are adequately represented. It will be recalled that, in our earlier discussion of the present law governing class actions, we observed that a self-appointed class representative is now under no duty to inform class members of the existence of a class action.[1] We concluded that, in view of the binding effect of the judgment in a class action, and the lack of any requirement under existing law that the court ensure that the interests of class members are protected, the absence of a notice requirement is a major deficiency of Rule 75 of the Supreme Court of Ontario Rules of Practice.[2] The second function of notice is to advise class members of their right to opt out of a class action where the court has determined that some or all of the members of a class should be permitted to exclude themselves from the action.[3] A third purpose of notice in the class action context is to inform class members of steps that they will have to take following judgment in favour of the class on the common questions in order to obtain their individual recoveries.[4]

The second reason we have chosen to consider the issue of notice in some detail is that this issue has given rise to controversy in the United States. The giving of notice in a class action may be an expensive and laborious undertaking, depending on the method of notice employed and the size of the class. Hence, the questions whether notice should be sent, who should be responsible for sending notice and, more importantly, who should bear the

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[1] See *supra*, ch. 2, sec. 2(c)(iii)b.

[2] R.R.O. 1980, Reg. 540.

[3] For a discussion of opting out, see *supra*, ch. 12.

[4] For a discussion of the necessity for, and the conduct of, proceedings to determine individual issues, see *infra*, chs. 14 and 15.

cost of notice, are matters about which prospective litigants are likely to be greatly concerned.

In this chapter, we shall focus on the need for notice at the different stages of a class action. Except insofar as it is our general concern to minimize the expense and administrative burdens imposed by notice, we shall defer our consideration of the question of the cost of notice until a later chapter.[5]

In the context of class action litigation, several questions respecting notice must be answered. When should notice be given to the class? When notice is required, by what method should it be given and, in particular, should it be necessary to give individual notice to identifiable class members? What information should be included in a notice to the members of a class?

In striving to answer these and other relevant questions, we have sought guidance from the accumulated experience with notice under Rule 23 of the United States Federal Rules of Civil Procedure[6] and from other legislative efforts to deal with notice that, for the most part, are responses to perceived difficulties with Rule 23. Before we describe the approach to notice that we believe should be adopted in the proposed Ontario *Class Actions Act*, we turn to discuss the judicial and legislative approaches to notice taken in other jurisdictions, beginning with the notice provisions of Rule 23 itself.

2. NOTICE UNDER FEDERAL RULE 23

Rule 23 provides for the distribution of three kinds of notice. First, subdivision (c)(2) of Rule 23[7] requires that, in class actions brought under subdivision (b)(3), following certification, the court must "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort". It should be noted that a similar notice requirement does not apply to class actions brought under either subdivision (b)(1) or (b)(2) of Rule 23.

The second type of notice may be found in Rule 23(d)(2). Rule 23(d) gives a court power to make appropriate orders to protect the interests of the class and to expedite the suit. Rule 23(d)(2) provides that, among the orders that the court is empowered to make in the course of a class action, is an order that notice be given to some or all class members. Such notice may be ordered

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[5] See *infra*, ch. 17, sec. 5(d)(iv).

[6] Fed. R. Civ. P. 23, promulgated at 383 U.S. 1029 (1966).

[7] Fed. R. Civ. P. 23(c)(2) provides as follows:

> 23(c)(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

in any kind of class action, which distinguishes it from the mandatory post-certification notice in class actions brought under Rule 23(b)(3). For ease of reference, we shall refer to this discretionary notice as "general notice".

Finally, Rule 23(e) provides that notice must be given to all members of the class whenever a class action is dismissed or compromised.[8] This provision complements the requirement that a dismissal or compromise must receive the express approval of the court. As the policy considerations involved in the question of sending this so-called "settlement notice" are connected intimately with the issue of the conditions under which class actions should be terminated, we shall defer our discussion of this matter until we examine settlement in chapter 20.[9]

In the United States, the type of notice that should be sent following certification of a class action brought under Rule 23(b)(3) has been the source of considerable controversy. Indeed, this issue has contributed substantially to the burgeoning periodical literature about class actions.[10] Hence, it is to the treatment of post-certification notice under Rule 23 that we shall first turn our attention. We shall then proceed to discuss the use of general notice under Rule 23(d)(2).

(a) Post-Certification Notice

(i) General

In the previous chapter, we discussed the approach taken to opting out under Rule 23. We explained that, when this Rule was revised in 1966, a right of exclusion was extended to class members only in class actions brought under subdivision (b)(3) of the Rule. This approach reflected the view of the Advisory Committee on Civil Rules that drafted Rule 23 that (b)(3) class actions were of a fundamentally different character from the other two categories of class action, and that this distinction was significant for the design of particular features of the class action mechanism. The approach taken in Rule 23 to notice mirrors that taken to opting out, as one of the primary purposes of post-certification notice is to apprise class members of their right to exclude themselves from the action.[11]

Although Rule 23 expressly stipulates that post-certification notice is required only in (b)(3) class actions, there has been some debate about

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[8] Fed. R. Civ. P. 23(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs".

[9] See *infra*, ch. 20, sec. 5.

[10] See Note, "Developments in the Law – Class Actions" (1976), 89 Harv. L. Rev. 1318, at 1324 (hereinafter referred to as "Harvard Developments").

[11] See Advisory Committee on Civil Rules, "Proposed Amendments to the Rules of Civil Procedure for the United States District Courts", 39 F.R.D. 69 (1966), at 104-05 (hereinafter referred to as "Advisory Committee Notes").

whether the guarantee of "due process" found in the Constitution of the United States[12] dictates that some form of post-certification notice must be given in all class actions, regardless of classification. While the case law reveals that the courts have adopted conflicting positions,[13] the weight of the academic commentary has favoured the interpretation that due process does not demand the distribution of notice in every case.[14] We do not intend to explore the intricacies of this constitutional debate, as they are not relevant in the Ontario context. We pause only to note the existence of this continuing disagreement among various courts in the United States.

As noted earlier, the major controversy respecting notice has concerned the method of notice required by Rule 23(c)(2). The court is instructed to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort". Does this language demand that individual notice be sent to all class members who can be identified, or will a less specific form of notice sometimes be "the best notice practicable"? This issue is particularly important, as it raises the question of who should pay for the identification of the class members and the distribution of the requisite notice. The potential expense of sending notice is a cost that neither party can afford to contemplate with equanimity. Although, in the United States, the cost of notice would be shifted eventually to the losing party as a taxable cost,[15] someone must incur the initial expense. If individual notice were required to be sent to all identifiable members of a very large class, this might constitute a financial burden that the class plaintiff would be unable to bear. As a result, the class action might have to be abandoned for reasons unrelated either to its propriety as a class suit or to its substantive merits.

Until 1974, there was a division of opinion in the case law and among academics whether individual notice to identifiable class members was mandatory under Rule 23(c)(2), regardless of its effect on the continued

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[12] See discussion *supra*, ch. 8, sec. 4(c).

[13] See cases summarized in Newberg, *Newberg on Class Actions* (1977), Vol. 2 (Cum. Supp. 1980), §2550a, at 354-58, *nn*. .32-.40.

[14] See Harvard Developments, *supra*, note 10, at 1402-16; Homburger, "State Class Actions and the Federal Rule" (1971), 71 Colum. L. Rev. 609, at 643-47; Wright and Miller, *Federal Practice and Procedure* (1972), Vol. 7A, §1786, at 142-43; Newberg, *supra*, note 13, Vol. 2, §§2300-2300b, at 29-46; Fisch, "Notice, Costs, and the Effect of Judgment in Missouri's New Common-Question Class Action" (1973), 38 Mo. L. Rev. 173, at 187-97; Miller, "Problems of Giving Notice in Class Actions", 58 F.R.D. 313 (1973), at 313-17; Comment, "The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23" (1975), 123 U. Pa. L. Rev. 1217; and Dam, "Class Action Notice: Who Needs It?", [1974] Sup. Ct. Rev. 97, at 109-16.

[15] Fed. R. Civ. P. 54(d) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs". It should be noted that, in the United States, "costs" do not comprehend lawyers' fees. For a discussion of costs in the American context, see *infra*, ch. 17, sec. 3(b). See, also, Newberg, *supra*, note 13, Vol. 2, §2375, at 56-57; Miller, *supra*, note 14, at 323; and Federal Judicial Center, Board of Editors, *Manual for Complex Litigation* (1978) (Clark Boardman), §1.45, at 73 (hereinafter referred to as "Manual").

viability of a particular class action. A minority of courts and several commentators took the position that the words "best notice practicable under the circumstances" allowed the court to take account of practical considerations and, in particular, the cost of ordering such notice. The majority of courts, however, adopted a strict, constructionist approach to the language of Rule 23(c)(2), interpreting it to require the giving of individual notice.[16]

The controversy was eventually settled by the United States Supreme Court in the decision known as "*Eisen IV*".[17] As the particular factual circumstances of the *Eisen* case are crucial to an understanding of the significance of the decision, we shall describe in some detail the case and its circuitous odyssey through the United States federal courts.[18]

The representative plaintiff, Mr. Morton Eisen, brought a class action on behalf of all persons who had bought and sold securities in "odd-lots" on the New York Stock Exchange during a specified four year period. An "odd-lot" is a group of less than one hundred shares. Throughout the relevant period, odd-lot trading was processed by the two defendant brokerage firms, Carlisle & Jacquelin and DeCoppet & Doremus, instead of through the regular auction market of the New York Stock Exchange. Together these firms handled ninety-nine percent of the trading. In each odd-lot transaction, the investor was obliged to pay a service surcharge known as the "odd-lot differential", as well as the standard brokerage commission levied on so-called "round-lot" transactions.

Although Mr. Eisen possessed a claim worth only seventy dollars, he launched a class action in which he alleged that the defendant brokerage firms, in violation of the Sherman Act,[19] had conspired to monopolize odd-lot trading and had charged an unfair odd-lot differential.[20] The class on whose behalf the suit was brought included six million members. The names of approximately two million investors could be determined "with reasonable effort" using existing computer records.[21] It was estimated that, at the first class postage rate, the cost of sending individual notice by mail to all identifiable class members would be $315,000. For the four million class members who were not identifiable, notice by means of publication would have to be arranged, which would incur further expense. Mr. Eisen argued

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[16] See Newberg, *supra*, note 13, Vol. 2, §2275, at 22-28.

[17] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (hereinafter referred to as "*Eisen IV*").

[18] For the lower court decisions, see *Eisen v. Carlisle & Jacquelin*, 41 F.R.D. 147 (S.D.N.Y. 1966); 370 F.2d 119 (2d Cir. 1966), *cert.* denied 386 U.S. 1035 (1967) (*Eisen I*); 391 F.2d 555 (2d Cir. 1968) (*Eisen II*); 50 F.R.D. 471 (S.D.N.Y. 1970); 52 F.R.D. 253 (S.D.N.Y. 1971); 54 F.R.D. 565 (S.D.N.Y. 1972); and 479 F.2d 1005 (2d Cir. 1973) (*Eisen III*). See, generally, Newberg, *supra*, note 13, Vol. 2, §§2225-2250, at 5-22, and §2350, at 48-56.

[19] 15 U.S.C. §§1 and 2.

[20] The New York Stock Exchange also was sued under the Securities Exchange Act of 1934, 15 U.S.C. §§78f and 78s, for its alleged failure to regulate the assessment of the odd-lot differential.

[21] *Eisen IV, supra*, note 17, at 166.

that, under the circumstances, individual notice should not be required for the identifiable class members, and that a form of publication notice should suffice.

The enormous discrepancy between the potential cost of distributing notice and the personal stake of the class representative afforded a dramatic illustration of the importance of resolving the issue whether Rule 23(c)(2) unwaveringly demanded individual notice. If Mr. Eisen were obliged to pay for notice, he would have no choice but to discontinue the class action. Although he could recover his expenditure if the class suit were successful,[22] victory was not sufficiently certain to make the outlay a reasonable financial risk, even if he had the necessary funds. Indeed, short of absolute certainty of success, one would question whether the expenditure could ever be justified under the circumstances.

When the District Court considered the issue of notice, it addressed both the question of the prescribed method of notice and the question of who should bear its cost.[23] The Court concluded that, in light of the projected expense, individual notice to all identifiable class members was not required. Instead, it devised the following scheme to notify class members:[24]

> [The District Court] proposed a notification scheme consisting of four elements: (1) individual notice to all member firms of the [New York Stock] Exchange and to commercial banks with large trust departments; (2) individual notice to the approximately 2,000 identifiable class members with 10 or more odd-lot transactions during the relevant period; (3) individual notice to an additional 5,000 class members selected at random; and (4) prominent publication notice in the Wall Street Journal and in other newspapers in New York and California.

The cost of the scheme was estimated at $21,720.

Turning to the second aspect of the notice issue, that is, who should pay for it, the Court expressed concern that, if this expense were to be borne solely by the class plaintiff, it would end a "possibly meritorious suit".[25] The Court concluded that it would be justifiable to impose the cost of notice on the defendants if the plaintiff could demonstrate "a strong showing of likelihood of success at trial on the merits".[26] In order to make this determination, the Court ordered a preliminary hearing on the merits of the action. After this hearing, the District Court found that the class plaintiff was "more than likely" to succeed later at trial, and that therefore the defendants should pay ninety percent of the notice cost.[27]

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[22] See *supra*, note 15.

[23] *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971).

[24] This description is that of the United States Supreme Court in *Eisen IV, supra*, note 17, at 167.

[25] *Supra*, note 23, at 269.

[26] *Ibid.*, at 271.

[27] 54 F.R.D. 565 (S.D.N.Y. 1972), at 567.

On appeal, the Court of Appeals for the Second Circuit, in *Eisen III*,[28] rejected the notice plan proposed by the District Court. In the view of the Court of Appeals, Rule 23(c)(2) unambiguously required that individual notice be sent to identifiable class members, notwithstanding the ramifications of this requirement for the continuation of the class suit. The Court held, moreover, that the District Court lacked jurisdiction to conduct a preliminary "mini-hearing" on the substantive merits of the action for the purpose of allocating the cost of notice.[29]

Eight years after its initiation, the *Eisen* case reached the United States Supreme Court. The plaintiff advanced two reasons in support of his position. First, he argued that the "prohibitively high cost" of individual notice would oblige him to abandon the action. Secondly, he contended that, since no class member possessed a claim sufficiently large to support the cost of bringing his own suit, there was no reason to send individual notice, as it would be economically irrational to opt out for that purpose.

Rejecting these arguments, the Supreme Court agreed with the Court of Appeals for the Second Circuit that the District Court had been in error. The Court made rulings on three matters. First, it held that, under Rule 23(c)(2), the class plaintiff must provide individual notice to identifiable class members. Secondly, the United States Supreme Court stated that the District Court had no jurisdiction to conduct a preliminary hearing on the merits of the case for the purpose of allocating the cost of notice. Thirdly, it concluded that the class representative must pay for notice as part of his responsibility to finance his own action. Although the decision occasionally makes reference to due process considerations, it is clear that the decision is based on a textual interpretation of Rule 23(c)(2).[30]

The response to *Eisen IV* among commentators was negative. Their criticism centred on the financial disincentives to prospective representative plaintiffs.[31] Several suggested that, in view of the interpretation given to Rule

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[28] *Eisen III, supra*, note 18.

[29] *Eisen III* inspired numerous articles: see, for example, Note, "*Eisen v. Carlisle & Jacquelin* – Fluid Recovery, Minihearings and Notice in Class Actions" (1974), 54 B.U. L. Rev. 111, and Note, "Recent Developments – Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs by Defendant in Class Action Rejected" (1973), 73 Colum. L. Rev. 1641.

[30] Mr. Justice Powell, who delivered the opinion of the Court in *Eisen IV, supra*, note 17, commented as follows at 176 (citation and footnote omitted):

> The short answer to these arguments is that individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23. As the Advisory Committee's Note explained, the Rule was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit . . . . Accordingly, each class member who can be identified through reasonable effort must be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately or that he may remain in the class and perhaps participate in the management of the action. There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.

[31] There were predictions that *Eisen IV* would have the effect of deterring class actions.

23 by the Supreme Court, the Rule should be amended.[32]

A subsidiary issue that was not addressed by the Supreme Court in *Eisen IV* was whether the cost of identifying class members for the purpose of sending post-certification notice could be apportioned between the defendant and the class plaintiff. Until 1978, when this issue was decided by the United States Supreme Court in *Oppenheimer Fund, Inc. v. Sanders*,[33] the cases were divided on the question whether this cost could be shifted to the defendant.[34]

In the *Oppenheimer* case, the Supreme Court held that, in very limited circumstances, the cost of identification might be borne by the defendant. The Court was of the opinion that the class plaintiff ordinarily should perform the tasks necessary for the giving of post-certification notice, such as the identification of class members, as part of his responsibility as representative plaintiff, and that he should bear the cost. The Supreme Court stated, however, that a court may exercise its discretion under Rule 23(d) and order the defendant to perform these tasks when he is able to do so "with less difficulty or expense than could the representative plaintiff".[35] When the court orders the defendant to perform a task necessary for the distribution of notice under Rule 23(c)(2), it has a discretion to order that the expense should be apportioned between the defendant and the class plaintiff.[36]

Yet, as we have discussed earlier, the available empirical evidence indicates that, although there was a decline in the number of class actions filed between 1976 and 1980, the connection between this phenomenon and the *Eisen IV* decision is not clear: see discussion *supra*, ch. 4, sec. 3(b)(ii)a.

[32] See, for example, Jacoby and Cherkasky, "The Effects of Eisen IV and Proposed Amendments of Federal Rule 23" (1974), 12 San Diego L. Rev. 1, and Note, "Civil Procedure – Class Actions – Amending Rule 23 in Response to Eisen v. Carlisle & Jacquelin" (1974), 53 N.C. L. Rev. 409.

[33] 437 U.S. 340 (1978). Earlier decisions were 20 Fed. R. Serv. 2d 1218 (S.D.N.Y. 1975) (certifying the case as a class action and allocating class identification costs to the defendant), aff'd in part and rev'd in part *Sanders v. Levy*, 558 F.2d 636 (2d Cir. 1976) (panel) (affirming the class certification and reversing the cost allocation), rev'd 558 F.2d 646 (2d Cir. 1977) (*en banc*) (affirming the District Court's cost allocation). Like the *Eisen* case, the *Oppenheimer* decision has inspired academic commentary in the periodical literature: see, for example, Comment, "Cost of Notice in Class Actions after *Oppenheimer Fund, Inc. v. Sanders*" (1978), 78 Colum. L. Rev. 1517; Comment, "Allocation of Identification Costs in Class Actions: *Sanders v. Levy*" (1978), 91 Harv. L. Rev. 703; Note, "Civil Procedure – Class Actions – Allocation of Identification Costs" (1979), 12 Creighton L. Rev. 859; and Note, "Notice Cost Problems Under Rule 23(b)(3) and (c)(2) After *Oppenheimer Fund, Inc. v. Sanders*", [1979] Duke L. J. 882. See, also, Newberg, *supra*, note 13, Vol. 2 (Curr. Supp. 1981), §§2380 and 2385, at CS7-5 - CS7-10.

[34] For summaries of the conflicting cases, see Newberg, *supra*, note 13, Vol. 2 (Cum. Supp. 1980), §2250, at 316-18, *n*. .30.

[35] *Oppenheimer Fund, Inc. v. Sanders, supra*, note 33, at 356.

[36] While the Supreme Court expressly eschewed any attempt to list the circumstances in which a court might justifiably impose the cost of identifying class members on a defendant, it did suggest two instances where this might be appropriate. First, the cost might be borne by the defendant if the expense were "so insubstantial as not to warrant the effort required to calculate it and shift it to the representative plaintiff". Secondly, the particular task might be one that the defendant might easily perform in the ordinary course of its business, such as the enclosure of notices in periodic mailings to class members: see *Oppenheimer Fund, Inc. v. Sanders, supra*, note 33, at 359.

Although, as a result of *Eisen IV* and *Oppenheimer Fund, Inc. v. Sanders*, it has been settled that individual notice must be sent to identifiable class members in Rule 23(b)(3) class actions, and that the class plaintiff ordinarily must bear the initial cost of notice, including costs incidental to its dissemination, other aspects of post-certification notice have been left to be developed by the district courts. We turn now to a discussion of these other aspects.

(ii) The Mechanics of Post-Certification Notice

Rule 23(c)(2) provides that, in an action maintained under subdivision (b)(3) of the Rule, "the court shall direct" individual post-certification notice to identifiable members of the class. This language does not demand that the court itself actually send the requisite notice. It signifies that the notice is that of the court and that the court should exercise control over its distribution.[37]

Generally, the requirement that individual notice be sent to identifiable class members is satisfied by some form of mailing. Although first class mail is usually ordered, courts also have relied both on less formal methods, such as third class mail and post cards, and on more formal notice, such as registered mail.[38] Apparently, there has been no insistence on the use of personal service.[39]

Individual notice is not required in (b)(3) class actions where class members are not identifiable; in such cases, courts are obliged to order "the best notice practicable under the circumstances". Nor is individual notice demanded in class actions brought under subdivision (b)(1) or (b)(2); indeed, no notice is expressly required in the latter types of action, although some courts have ordered post-certification notice in such cases.

Where individual notice has not been ordered, courts have exhibited considerable ingenuity in devising methods of notice designed to attract the attention of the class. The most obvious manner of notice is by publication. Although there has been some criticism of the ability of a published notice to apprise intended recipients of their rights,[40] its effectiveness would seem to depend on the nature of the class and the design of the notice. A class consisting of members of a particular group that generally secures information concerning its special interests from certain sources would be likely to see a notice published in one of them. The utility of a published notice probably would depend as well on the frequency of its appearance, its location, size, and other design factors.[41]

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[37] See Manual, *supra*, note 15, §1.45, at 71; Wright and Miller, *supra*, note 14, §1788, at 164; and Newberg, *supra*, note 13, Vol. 2, §2450, at 124-26.

[38] See Newberg, *supra*, note 13, Vol. 2, §2450a, at 130.

[39] The Advisory Committee on Civil Rules that drafted Rule 23 stated that "[n]otice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process": see Advisory Committee Notes, *supra*, note 11, at 107.

[40] See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), at 315-16.

[41] See Newberg, *supra*, note 13, Vol. 2, §2450b, at 134-37.

In giving post-certification notice to the class, some courts have ordered that notice be given by methods more informal than publication. For example, notice has been posted on bulletin boards.[42] Such notice may be effective where the members of the class belong to an organization, work at the same job, or are otherwise accustomed to obtaining relevant, important information through an established method of communication.[43]

Counsel for either the representative plaintiff or the defendant, or both, may be requested to draft a notice and submit it for court approval.[44] Generally, courts assign the task of distributing notice, whatever the method ordered, to the class representative. Where this responsibility can be discharged more easily by the defendant, however, he may be ordered to perform this task,[45] although the cost nonetheless ordinarily will be imposed upon the plaintiff as a result of the *Eisen IV* and *Oppenheimer* cases. Typically, defendants have been directed to give notice when regular correspondence – such as a periodic billing statement – is sent to the class in the course of their business.[46]

The content of post-certification notice depends, to a degree, on the exercise of judicial discretion, as Rule 23(c)(2) expressly requires only certain information to be given to class members, having to do with the right of class members to take affirmative action, either by opting out of the class action or by entering an appearance through counsel.[47] It has been suggested that, in order to allow a class member to make an informed decision concerning whether he should take action, notice should also describe the nature of the class action and the issues that are to be litigated.[48]

In the course of supervising the content of post-certification notice, courts have expressed concern about the necessity for objectivity and

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[42] See, for example, *Ostapowicz v. Johnson Bronze Co.*, 54 F.R.D. 465 (W.D. Pa. 1972), at 467, and *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975), at 918.

[43] Among the most imaginative methods of notice that has come to our attention was the placement of a notice on milk cartons in an antitrust class action seeking damages caused by alleged price fixing of dairy products: see *In re Arizona Dairy Products Litigation*, 1975-2 Trade Cases ¶60,555 (D. Ariz. 1975). See, also, discussion in "Developments – Class Action Mechanics – Notice" (1975), 4 C.A.R. 480, at 484-87.

[44] See cases summarized in Newberg, *supra*, note 13, Vol. 2 (Cum. Supp. 1980), §2450, at 335-36, *n.* .18.

[45] See Newberg, *supra*, note 13, Vol. 2, §2450d, at 139-41.

[46] See, for example, *Gates v. Dalton*, 67 F.R.D. 621 (E.D.N.Y. 1975), at 633. See, also, *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), at 456; *Zachary v. Chase Manhattan Bank*, 52 F.R.D. 532 (S.D.N.Y. 1971), at 535; and the cases summarized in Newberg, *supra*, note 13, Vol. 2 (Cum. Supp. 1980), §2450d, at 341-42, *n.* .170.

[47] See *supra*, note 7.

[48] See, for example, Wright and Miller, *supra*, note 14, §1787, at 162. Newberg recommends that this notice should describe the progress of the suit to the date of distribution, define the class, and explain that the class action has been certified. In addition to describing the issues, the notice should explain the rights and obligations of absent class members: see Newberg, *supra*, note 13, Vol. 2, §§2475d-2475j, at 147-63.

clarity.[49] The need for scrupulous objectivity arises from the fact that this notice is the notice of the court. Consequently, care is taken to ensure that there is no expression of opinion concerning the merits of a particular action. In fact, it would seem to be the usual practice to include an express disclaimer of any judicial view of the substantive merits of the action[50] and a statement that there has been no admission of liability on the issues by the defendant.[51]

The concern for clarity arises from an awareness that a notice is useful only if it is understood by its intended recipients. Technical legal terminology and peculiar modes of expression, however familiar and readily comprehensible to members of the legal profession, may be, without the assistance of lawyers, an impenetrable mystery to laypersons, including reasonably sophisticated individuals. Consequently, the responsibility of the court to ensure that the notice is intelligible to the class has been emphasized.[52]

In satisfying the strictures of Rule 23(c)(2), courts have taken a pragmatic, flexible approach to those matters that have been left to their discretion. In distributing notice to non-identifiable class members and in settling the content of notice, considerable imagination has been demonstrated. On the most important issue, however – whether individual notice to identifiable class members must be sent in all cases – American courts are bound to follow *Eisen IV*, regardless of its practical implications for the maintenance of a particular class action.

(b) General Notice

As we have explained, the requirement of mandatory post-certification notice applies only to class actions brought under Rule 23(b)(3). In all categories of class action, however, the court is given an express discretion to "manage" the class action by making appropriate orders in the course of the suit.[53] Among the powers conferred on the court is the power to order that notice be given to some or all of the class members. Rule 23(d)(2) provides as follows:

> 23(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule

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[49] See, for example, *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977), at 1103-06, and *Rodgers v. United States Steel Corp.*, 70 F.R.D. 639 (W.D. Pa. 1976), at 644-47. See, also, Newberg, *supra*, note 13, Vol. 2, §2475, at 143-44.

[50] See Wright and Miller, *supra*, note 14, §1787, at 162, and Newberg, *supra*, note 13, Vol. 2, §2475e, at 150-51. The following disclaimer is taken from a sample notice suggested in the Manual, *supra*, note 15, §1.45, at 277:

> This notice is not to be understood as an expression of any opinion by this Court as to the merits of any of the claims or defenses asserted by either side in this litigation, but is sent for the sole purpose of informing you of the pendency of this litigation so that you may make appropriate decisions as to steps you wish to take in relation to this lawsuit.

[51] See Newberg, *supra*, note 13, Vol. 2, §2475g, at 152.

[52] See Manual, *supra*, note 15, §1.45, at 74, and Newberg, *supra*, note 13, Vol. 2, §2475, at 143-44.

[53] Fed. R. Civ. P. 23(d). See *supra*, ch. 11, sec. 3.

> applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; . . .

Rule 23(d)(2) does not grant the court a power that it lacked prior to the 1966 amendment of Rule 23. It is but a codification of equitable power already possessed by federal courts.[54]

Much of what we have said earlier about post-certification notice applies equally to general notice. Thus, counsel for one or both parties to a class action may be requested to draft a notice and submit it to the court for approval. Defendants may be asked to distribute notice. However, because there is no requirement of individual notice, the court has flexibility to order whatever method of notification it considers appropriate in the circumstances.[55]

Before general notice may be ordered, there must be a judicial determination that such notice will facilitate either "the protection of the members of the class or the fair conduct of the action". Although the Advisory Committee apparently envisaged that general notice would be used primarily as a means of ensuring that the interests of class members are adequately represented, the courts have employed general notice for a broad range of purposes. The following passage suggests the variety of uses to which this type of notice has been put:[56]

> Among endless other possibilities, the supplemental notice scheme has been applied to afford notice of pendency of (b)(1) or (b)(2) litigation; question absentees on various matters; correct prior notification inaccuracies; indicate denial of a class motion; remind class members of the need for an obligatory response; detail proposed disposition of claims information; and transmit final judgment orders, as well as directional notice to third parties. Relevant content inclusions will, naturally, be dependent on which purpose the (d)(2) notice is intended to serve.

One purpose for which general notice has been employed in the past has been held to be unauthorized. As we discussed in the preceding chapter dealing with the "opt out/opt in issue", some courts, in apparent disregard of the "opt out" language of Rule 23(b)(3), have required class members, on pain of dismissal of their claims, to submit information to the court before the liability of the defendant has been determined. Some courts that have relied upon this procedure have invoked the power to order notice under Rule

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[54] See Wright and Miller, *supra*, note 14, §1793, at 201, and Advisory Committee Notes, *supra*, note 11, at 106.

[55] See Newberg, *supra*, note 13, Vol. 2, §§2560, 2575, and 2575a, at 204-06 and 213-30.

[56] See Newberg, *supra*, note 13, Vol. 2, §2575, at 215 (footnotes omitted). See, also, Newberg, *supra*, note 13, Vol. 2 (Cum. Supp. 1980), §2570, at 363-66, *n.* .100.

23(d)(2) as authority for the exercise of this discretion.[57] However, the prevailing view is that use of notice for this purpose is a "clear abuse of discretion".[58]

Interestingly, Rule 23 fails to make provision for the sending of what may be called "post-judgment notice", the purpose of which is to inform class members of the steps that they will have to take following judgment against the defendant in order to claim their individual recoveries. As we shall explain, we believe that the employment of notice for this purpose is very important; indeed, we consider it more important than post-certification notice, for without effective notice at this stage of the proceedings, class members may be unable to obtain the relief to which they are entitled. While Rule 23 does not provide expressly for the giving of post-judgment notice, courts have ordered that notice be given when affirmative action on the part of absent class members is necessary,[59] presumably under the authority of the general notice provision.

In contrast to Rule 23, other class action procedures do deal expressly with post-judgment notice. We shall describe these provisions in the next section, in which the approach to the notice issues taken in other class action mechanisms will be discussed.

3. NOTICE PROVISIONS IN OTHER CLASS ACTION MECHANISMS

A review of numerous enacted and proposed class action mechanisms reveals that several approaches have been taken to the major notice issues. As we have explained, the most controversial issues have been whether notice should be given to the class following certification and, if so, the method of notice that should be employed. At least sixteen states[60] have followed Rule 23, expressly requiring post-certification notice in (b)(3) class actions only, while remaining silent with respect to the necessity for notice in other kinds of class action. Texas Rule 42 imposes an even more onerous notice requirement than Rule 23, as it stipulates that the court, in all class actions, "shall order . . . the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort".[61]

Section 904 of the New York Civil Practice Law and Rules[62] takes a

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[57] For a discussion of the use of the "proof of claim" procedure, see *supra*, ch. 12, sec. 2(b)(ii).

[58] See Manual, *supra*, note 15, §1.45, at 76.

[59] See, for example, *Kyriazi v. Western Electric Co.*, 465 F. Supp. 1141 (D.N.J. 1979), at 1144.

[60] Alabama, Arizona, Colorado, Delaware, Hawaii, Idaho, Indiana, Nevada, South Dakota, Minnesota, Missouri, Montana, Utah, Vermont, Washington, and Wyoming.

[61] Tex. R. Civ. P. 42(c)(2).

[62] N.Y. Civ. Prac. Law (McKinney). For commentary, see Weinstein, Korn, and Miller, *New York Civil Practice* (1979), Vol. 2, ¶904, at 9-75.

somewhat more flexible approach to the question of post-certification notice. In class actions seeking primarily injunctive or declaratory relief, post-certification notice need not be distributed, "unless the court finds that notice is necessary to protect the interests of the represented parties and that the cost of notice will not prevent the action from going forward".[63] In other kinds of class action, "reasonable" notice is mandatory.[64] The court, however, has a discretion to determine how notice should be given. In deciding this matter, consideration must be given to the following factors, set out in section 904(c):

> I. the cost of giving notice by each method considered
>
> II. the resources of the parties and
>
> III. the stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class.

The requirement that the court examine the cost of various methods of notice and the resources of the parties would appear to reflect a concern that a class action, having satisfied the certification tests, should not be prevented from continuing due to the imposition of a method of notice that the parties cannot afford.[65] The third factor invites the court to ascertain whether in fact class members are likely to wish to appear individually or to opt out of the action for the purpose of bringing their own actions, in which case a more personal form of notice presumably should be ordered.

As in the case of New York, the class action rules of Kansas, New Jersey, and Pennsylvania make post-certification notice mandatory in (b)(3) type class suits, but give the court a discretion with respect to the method of notice.[66] Four states – Illinois, Arkansas, Maryland, and Massachusetts –

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[63] N.Y. Civ. Prac. Law §904(a) (McKinney).

[64] *Ibid.*, §904(b). Oklahoma also provides that, in class actions in which only injunctive or declaratory relief is claimed, notice should be given when "necessary to protect the interests of the represented parties", and when "the cost of notice will not prevent the action from going forward". In class actions seeking monetary relief, the court must order the "notice most practicable under the circumstances . . . including individual notice": 12 Ok. Stat. Ann. §15 (1978).

[65] Section 904(c)II makes relevant the "resources of the parties", as opposed to the resources of the class plaintiff, because under §904(d) the court may, "if justice requires", order the defendant to bear the expense of notice or may apportion the cost between the parties, in which case a preliminary hearing may be held to determine how this should be done. Upon the conclusion of the action, the court may, but is not required to, allow the prevailing party the notice costs. Conceivably, then, under the New York rule, the defendant may be obliged to pay for the cost of notification and may not recover the expenditure if he is successful at trial. Thus, §904(d) of the New York Civil Practice Law and Rules has the effect of avoiding the rule established by the United States Supreme Court in *Eisen IV*, *supra*, note 17: see discussion *supra*, this ch., sec. 2(a)(i).

[66] New Jersey Rule of Civil Practice 4:32-2(b) requires "the best notice practicable under the circumstances, consistent with due process of law". The Kansas Rule refers to "reasonable notice": see Kansas Code Civ. Proc. §60-223(c)(2). Rule 1712 of the Pennsylvania Rules of Civil Procedure gives the court a discretion as to the type and content of notice, but requires consideration of "the extent and nature of the class, the relief requested, the cost of notifying the members and the possible prejudice to be suffered by members of the class or by other parties if notice is not received".

give the court a discretion, in all kinds of class action, to decide whether notice should be sent and the method by which it is to be distributed. Section 57.4 of the Illinois Civil Practice Act,[67] for example, provides that "the court in its discretion may order such notice that it deems necessary to protect the interests of the class and the parties".

The American Uniform Class Actions Act[68] and the class action provisions of the Quebec *Code of Civil Procedure*[69] require that notice be given in every class action that has been allowed to proceed, including suits claiming exclusively non-monetary relief.[70] Article 1046 of the *Code of Civil Procedure* empowers the court to determine the method of notice, including whether class members should be given individual notice. The Uniform Class Actions Act requires that personal or mailed notice be given to each class member having a potential recovery estimated to exceed one hundred dollars "if his identity and whereabouts can be ascertained by the exercise of reasonable diligence".[71] For class members incapable of identification or location, or having smaller claims, the court has a discretion to decide what method of notice should be employed.[72] In making this determination, the court must consider "the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice".[73] The court is enjoined, at a minimum, to choose a method of notice "reasonably calculated to apprise the members of the class of the pendency of the action".[74]

The reform proposals of the Office for Improvements in the Administration of Justice of the United States Department of Justice[75] would have given

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[67] Illinois Civil Practice Act, Ill. Ann. Stat. ch. 110 (Smith-Hurd 1981 Supp.).

[68] National Conference of Commissioners on Uniform State Laws, Uniform Class Actions Act, Uniform Laws Ann. (1975), Vol. 12 (Cum. Supp. 1981), at 20, §7(a) (hereinafter referred to as "U.C.A.A."). For commentary, see Alpert, "The Uniform Class Actions Act: Some Promise and Some Problems" (1979), 16 Harv. J. Legis. 583, at 615-27.

[69] *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, arts. 999-1051, as enacted by S.Q. 1978, c. 8, s. 3 (hereinafter referred to as "C.C.P.").

[70] U.C.A.A., *supra*, note 68, §7(a), and C.C.P., *supra*, note 69, art. 1005(*c*).

[71] U.C.A.A., *supra*, note 68, §7(d).

[72] *Ibid.*, §7(e).

[73] *Ibid.*, §7(c).

[74] *Ibid.*, §7(e). This provision also states that "[t]echniques calculated to assure effective communication of information concerning commencement of the action shall be used". Section 7(e) includes the following list of techniques that may be employed: personal or mailed notice, notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups.

[75] A Bill To provide for the reform of class action litigation procedures, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill S. 3475, 95th Cong., 2d Sess. (1978) (hereinafter referred to as "O.I.A.J. Bill S. 3475"), and Small Business Judicial Access Act of 1979, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill H.R. 5103, 96th Cong., 1st Sess. (1979) (hereinafter referred to as "O.I.A.J. Bill H.R. 5103").

the court a broad discretion with respect to post-certification notice. Bills S. 3475 and H.R. 5103 provided that, in a class compensatory action, the court must give notice that is "reasonably necessary to assure adequacy of representation of all persons included in the class and fairness to all such persons".[76]

In both the Draft Bill for a Class Actions Act proposed by the Law Reform Committee of South Australia,[77] and Professor Williams' Model Consumer Class Actions Act,[78] post-certification notice has been left to the discretion of the supervising court: whether, how, and to whom notice should be given are matters for the exercise of this discretion. The court may order that the defendant give notice or pay the expense thereof. Section 5(3) of both draft proposals requires the court, in exercising its discretion, to consider "(*a*) the cost of giving notice in relation to the amount of any sums claimed in the action on behalf of individual members of the class; [and] (*b*) whether members of the class are likely to suffer substantial prejudice if they do not receive notice of the pendency of the action". In addition, the South Australia Draft Bill contains a third criterion, that is, "(*c*) the policy of this Act to facilitate class actions".

The proposed federal competition legislation, Bill C-42[79] and Bill C-13,[80] also conferred a discretion on the court to decide whether and how notice should be given to the class members. Unlike Williams' Model Consumer Class Actions Act and the South Australia Draft Bill, however, the factors to be considered by the court in determining these matters were to be settled by regulation.[81]

Like Rule 23, several of the class action mechanisms that we have examined empower the court to give general notice for the purpose of protecting the interests of the class.[82] It should be observed, however, that none of the class action schemes proposed or influenced by Professor Williams[83] includes a statutory provision to this effect.

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[76] O.I.A.J. Bill S. 3475, *ibid.*, §3013(e), and O.I.A.J. Bill H.R. 5103, *ibid.*, §3022(e)(2).

[77] Law Reform Committee of South Australia, "Draft Bill for a Class Actions Act", in *Thirty-sixth Report Relating to Class Actions* (1977), at 12, s. 5 (hereinafter referred to as "South Australia Draft Bill").

[78] Williams, "Model Consumer Class Actions Act", in "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 65, s. 5 (hereinafter referred to as "Williams' Model Act").

[79] *An Act to Amend the Combines Investigation Act*, Bill C-42, 1977 (30th Parl. 2d Sess.), s. 39.16 (hereinafter referred to as "Bill C-42"). For a discussion of this Bill, see *supra*, ch. 6, sec. 1(b)(iv).

[80] *An Act to Amend the Combines Investigation Act*, Bill C-13, 1977 (30th Parl. 3d Sess.), s. 39.14 (hereinafter referred to as "Bill C-13"). For a discussion of this Bill, see *supra*, ch. 6, sec. 1(b)(iv).

[81] Bill C-42, *supra*, note 79, s. 39.22(1)(c), and Bill C-13, *supra*, note 80, s. 39.2(1)(c).

[82] N.Y. Civ. Prac. Law §907.2 (McKinney); Illinois Civil Practice Act, Ill. Ann. Stat. ch. 110, §57.4 (Smith-Hurd 1981 Supp.); U.C.A.A., *supra*, note 68, §9(a)(2); and C.C.P., *supra*, note 69, art. 1045.

[83] South Australia Draft Bill, *supra*, note 77; Williams' Model Act, *supra*, note 78; Bill C-42, *supra*, note 79; and Bill C-13, *supra*, note 80.

In sharp contrast to Rule 23, several class action mechanisms contain express provisions relating to notice to class members following a finding of liability against the defendant on the common questions.[84] As indicated, the purpose of notice at this stage of the proceedings is to advise class members of the active measures that will be necessary to recover their shares of monetary relief. Particularly interesting in this regard are the South Australia Draft Bill[85] and Professor Williams' Model Consumer Class Actions Act,[86] each of which gives the court a discretion with respect to post-certification notice, but makes mandatory the sending of post-judgment notice and specifies its content.

4. NOTICE UNDER THE PROPOSED *CLASS ACTIONS ACT*

As we explained earlier, resolution of the notice issue requires an examination of a series of questions. The most crucial questions are whether notice should be distributed at all and, if so, in what circumstances and by what method. In particular, it is necessary to consider whether individual notice to members of the class should be required. Other important questions have to do with whether the content of notice should be specified, and whether there should be court approval of notice to ensure that it is comprehensible to members of the class and objective.

At the outset, it should be noted that, in considering the notice issue, the Commission is not obliged to defer to an absolute "due process" requirement;[87] rather, we are free to examine the issue strictly as a matter of policy. This does not mean, of course, that we are unconcerned about fairness. But the absence of a constitutional due process requirement relating to property[88] does permit us to engage in a functional inquiry respecting the appropriate purposes to be served by notice in a class action procedure.

In our view, the question whether notice should be given to class

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[84] See C.C.P., *supra*, note 69, art. 1030. Both O.I.A.J. proposals provide that, in a class compensatory action, if the defendant is found liable and the court orders subsequent trials of liability issues involving individual class members, the court must order the defendant to give notice to the class, including individual notice to identifiable persons likely to have been injured in excess of $300. In the case of a public action, O.I.A.J. Bill S. 3475 provides that, upon receipt of a public recovery, notice must be sent to inform injured persons of the recovery and of the steps necessary to file claims. Notice is to be given "by publication and such other means . . . reasonably likely to inform persons eligible to file a claim". The cost of notice is to be paid from the Public Recovery Fund. While O.I.A.J. Bill H.R. 5103 provides the same directions respecting the method of notice, it declines to impose an express notice requirement, which presumably was a drafting oversight: see O.I.A.J. Bill S. 3475, *supra*, note 75, §§3007(b) and 3014(c), and O.I.A.J. Bill H.R. 5103, *supra*, note 75, §§3005(b) and 3012(b).

[85] South Australia Draft Bill, *supra*, note 77, s. 9.

[86] Williams' Model Act, *supra*, note 78, s. 9.

[87] See discussion *supra*, ch. 8, sec. 4(c).

[88] Section 7 of the *Canadian Charter of Rights and Freedoms*, in the *Constitution Act, 1981*, being Schedule B of the *Canada Act*, Proposed Constitutional Resolution, December 8, 1981, provides only that "[e]veryone has the right to life, liberty and security of the person".

members must be answered in relation to the particular stages of a class action and the purposes to be served by notice at these stages. The two stages of class proceedings at which notice might be appropriate are immediately following certification and following a determination of the common questions in favour of the class.[89] As will be developed in greater detail below, the purposes to be served by notice at these two stages differ. In light of these differing purposes, we propose to discuss post-certification notice and post-judgment notice separately.

(a) Post-Certification Notice

After a class action is certified, it will either proceed to judgment or be settled with the approval of the court.[90] In both cases, the absent class members will be bound by the result.[91] In view of the important consequences to the class members of a judgment on the common questions, we have recommended, as one safeguard, the imposition of an adequacy of representation requirement as a prerequisite to certification.[92]

In our view, apart from an obvious informational purpose, there are two primary functions to be served by post-certification notice. First, although we regard the adequacy of representation requirement as the prime safeguard of the interests of absent class members, we believe that the sending of notice following certification can serve as additional protection. Notice advising persons of the certification of a class action, the outcome of which will affect their interests, would enable concerned class members to intervene in the action[93] and to make representations respecting the adequacy of representation. Secondly, should the court grant a right to opt out to some or all of the class members, notice would be necessary to inform them of their right to exclude themselves from the class action.

In our view, however, neither of these two possible functions of post-certification notice demands the institution of a rule requiring that notice be given in every class suit; nor do they require that a particular form of notice

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[89] The earliest point at which notice possibly could be given would be at the commencement of the action. However, no proposed or existing class action mechanism of which we are aware provides for notice at this stage of the proceedings and, generally speaking, there is no need for notice at the inception of the suit. Until the class action has been certified, the class does not exist as an entity.

Exceptionally, however, a need to send notice might arise. A class member might become aware of the class action and might wish to challenge the adequacy of the putative class plaintiff before the class has been certified, out of a concern that the suit may fail to overcome this initial hurdle. In such a case, it might be advisable to send notice to the class. It is our view that a general notice provision of the kind that we shall recommend later would be sufficiently broad to deal with such circumstances: see *infra*, this ch., sec. 4(c).

[90] For a discussion of settlement, see *infra*, ch. 20.

[91] For a discussion of the binding effect of a judgment in a class action, see *infra*, ch. 18.

[92] For a discussion of the importance of an adequacy of representation requirement, see *supra*, ch. 8, sec. 4(c)(iii).

[93] For a discussion of intervention, see *supra*, ch. 8, sec. 4(d).

should be employed. Notice inevitably will involve expense and labour that will vary with the method of distribution and the size of the class. We believe that the court should decide whether, in the circumstances of a particular class action, it is appropriate to incur these costs. If the costs outweigh the interests of the class members – as for example, where the claims of class members are small and the effect of ordering notice would be to prevent the class action from proceeding – it should be open to the court to dispense with notice. Accordingly, it is our recommendation that the court should be given a discretion, in all types of class action, to determine whether post-certification notice should be given to the class.[94]

Not only do we believe that the court should have a discretion whether to order post-certification notice; we are also of the view that the court should have a discretion to determine the method or methods of notice to be employed in a particular case. However, because, in our opinion, the interests of class members at this stage of the proceedings ordinarily will not require the use of individual notice, we are of the view that, unless the circumstances of the case dictate otherwise, the court should be encouraged to employ inexpensive methods of notice. Consequently, we recommend that the proposed *Class Actions Act* should provide that, *prima facie*, post-certification notice should be given by advertisement, publication, posting, or distribution.[95]

However, there may be circumstances in which more individualized and expensive methods of notice might be justified, particularly where it appears likely that class members may wish to take action to protect their interests. If, for example, some class members have large claims and have been granted a right to exclude themselves from the class action, the court might decide to order a form of individual notice. Accordingly, we recommend that the court should be able to order notice by some method other than those mentioned above.[96] We further recommend that the court should be empowered to order notice to be given in different ways to various members of the class.[97] We discuss below the factors that are relevant to these determinations.

Although we are of the view that notice should be handled by the courts on a case-by-case basis, nonetheless we consider it advisable to provide the courts with some guidance in the exercise of this discretion. Accordingly, we recommend that the court, in determining whether post-certification notice should be given and, if so, whether the court should order notice by a method other than by advertisement, publication, posting, or distribution, should consider, *inter alia*, the following factors: (1) the cost of giving notice; (2) the nature of the relief sought; (3) whether the court has determined that some or all members of the class may exclude themselves; (4) the size of the claims of

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[94] See Draft Bill, s. 16(1).

[95] See Draft Bill, s. 16(3).

[96] *Ibid.* It should be noted that, among the alternative methods of notice that the court may order under this section, is individual notice to a sample portion of the class. Because of the novelty of sampling notice, we have included a specific reference to this type of notice in our draft provision.

[97] *Ibid.*

the members of the class; and (5) the total amount of monetary relief claimed in the action.[98]

This list of factors is intended to direct the court's attention to whether, in a particular class action, it is justifiable to impose the cost and administrative inconvenience of notice at this stage of the proceedings. We believe that, as a general principle, the court should balance the cost of notice against the likelihood that class members might wish to take action in the circumstances of a particular case. In some cases, a class member might wish simply to follow the progress of the suit, perhaps in order to ascertain whether the class plaintiff is a sufficiently vigorous advocate on his behalf. Alternatively, a class member might prefer to take more active measures, for example, by applying to intervene in the suit. The list of factors that we have proposed should assist the court to determine whether the interest of class members in taking some sort of action outweighs the cost of notice. We turn now to discuss these factors briefly.

The first factor set out above – the cost of giving notice – requires no elaboration. Obviously, its weight in a particular case will vary, as the expense of notice will depend on the size of the class and the method or methods of notice contemplated.

Turning to the second factor, in a class action seeking exclusively injunctive relief, for example, it is likely that class members will prefer to remain passive, as the order of the court will affect their interests in any event. Hence, in such a case, the cost of giving notice would not be warranted. On the other hand, where the relief sought is damages, a class member may well be interested in assuming an active role in the litigation, particularly where his claim is a substantial one. Accordingly, we have proposed that the court, in determining whether, and the method by which, post-certification notice should be given, should have to consider the nature of the relief sought.

The third matter to which the court should direct its attention is whether some or all of the members of the class have been given a right to exclude themselves from the action. If the court has decided that the interests of individual class members are sufficiently important that they should be allowed to opt out of the class action, class members should be informed of this opportunity. The importance of a right of exclusion, in our view, justifies the cost of notice and, indeed, seems to favour a method of notice that is likely to reach the class members.

The size of the claims of members of the class – the fourth item that we would require the court to consider – identifies a major factor that will be relevant to whether an individual will be interested in taking some action. Particularly when claims are large, class members may wish to become actively involved in the suit.

The fifth factor – the total amount of monetary relief claimed in the action – simply directs the court to consider whether, in light of the potential

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[98] *Ibid.*, s. 16(2).

recovery to which the class may be entitled, it is reasonable to incur the cost of notice.

A final matter to which we wish to address our attention in this section is the content of post-certification notice. We consider it advisable that the proposed *Class Actions Act* specify the minimum content of post-certification notice. In our view, any such notice should include a brief description of the class and of the class action, including the relief claimed. Class members should be advised that they will be bound by any judgment on the questions common to the class. Furthermore, if the court has determined that individual class members may exclude themselves from the action, the notice should include a statement to this effect, indicating how and by what date members may exercise this right, and the consequences of doing so or failing to do so.[99] In addition, class members should be informed that they may apply to intervene in the class action. Finally, post-certification notice should provide the name and address of the class plaintiff to which further inquiries by interested class members may be directed. The Commission recommends that the above-mentioned information should be included in any post-certification notice sent to class members.[100]

(b) Post-Judgment Notice

Where the common questions have been decided in favour of the class, further proceedings may be necessary in order to determine individual issues that remain unresolved. As we shall describe in chapter 14,[101] if there has been an aggregate assessment of the total amount of monetary relief for which the defendant is liable, the shares of the individual class members still may have to be ascertained. Alternatively, because issues relating to the liability of the defendant may remain to be decided, an aggregate assessment may not be feasible, in which case the court will have to order proceedings to determine individual liability issues.[102] Such proceedings would be directed to determining whether the defendant is liable to particular class members and the amount of any liability.

Where active participation by individual class members is required, notice assumes greater importance than at the certification stage; without it, class members may not be aware of the need to come forward to secure the relief to which they may be entitled. In the event of a failure to act, class members will not receive any compensation and, due to the *res judicata* effect of the judgment on the common questions,[103] will be unable to sue the defendant in later separate actions.

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[99] For a discussion of the *res judicata* effect of a judgment on the common questions, see *infra*, ch. 18.

[100] See Draft Bill, s. 16(4). Both the Uniform Class Actions Act and the Quebec *Code of Civil Procedure* stipulate that post-certification notice must provide the class members with certain information: see U.C.A.A., *supra*, note 68, §7(b), and C.C.P., *supra*, note 69, art. 1006.

[101] See *infra*, ch. 14, sec. 3(c).

[102] For a discussion of the nature of individual proceedings, see *infra*, ch. 15, sec. 2.

[103] See *infra*, ch. 18, sec. 4.

The need for affirmative conduct and the serious consequences of inaction distinguish notice at this stage of the proceedings from post-certification notice, persuades us that a different approach is warranted. While, in the case of post-certification notice, we have proposed that the court should be empowered to decide whether notice should be sent, it is our view that, after the common questions have been decided in favour of the class, notice should have to be given to those members of the class whose participation is required, and we so recommend.[104] In this regard, we are in accord with the approach to notice taken by the class action proposals drafted or influenced by Professor Williams.[105]

In view of the importance of post-judgment notice, it is essential to ensure that it is likely to reach class members whose participation is invited. Consequently, it is our recommendation that, as a general rule, notice should be given by mail to all class members who are identifiable through reasonable means in terms of expense and effort, and by some method of advertisement, publication, posting, or distribution to all members who are not so identifiable.[106] However, we would not impose this requirement as an inflexible rule. We believe that the court should have a residual discretion to select whatever method is most appropriate in the circumstances, and we so recommend.[107]

We are satisfied that the statutory provision that we have recommended will allow the court sufficient flexibility to utilize innovative and flexible methods of notification. If class members are to receive the compensation to which they are entitled, courts will be required to exercise ingenuity, particularly where the identities of the class members are unknown. That notice can be successful in overcoming the effect of social and psychological barriers to affirmative action[108] is illustrated by the antibiotics antitrust price-fixing litigation in the United States.[109] In that litigation, notice was a crucial element in inducing claims, for relatively small amounts and at reasonable expense, from 880,000 class claimants resident in six states. Compensation equal to approximately one half the dollar value of the estimated total sales of the drug in question was distributed, despite the fact that the alleged overcharge took place ten to twenty years prior to the settlement, and that the class members could not be individually identified.[110]

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[104] See Draft Bill, s. 17(1).

[105] See *supra*, notes 83-86 and accompanying text.

[106] See Draft Bill, s. 17(2).

[107] In determining whether methods of notice other than those specifically prescribed by the statute should be used in a particular case, the court should consider all relevant factors. The court might examine, *inter alia*, the cost of giving notice, the total amount of monetary relief claimed in the action, and the size of the claims of the members of the class.

[108] See discussion *supra*, ch. 4, sec. 3(a)(ii)b.

[109] *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 706 (D. Minn. 1975).

[110] In the antibiotics litigation, the imaginative use of notice was decisive in "Operation Money Back", which was the name given to the process of distributing the settlement fund. In order to ensure that the notice, which was a claim form, was comprehensible to

With respect to the content of post-judgment notice, we are of the view that, at a minimum, such notice should inform class members that a judgment on the common questions has been given and that they may be entitled to relief thereunder. It should include a statement informing class members of the steps necessary to establish their claims. Furthermore, the notice should contain a warning that, upon failure to take such steps, a class member will not be entitled to relief, except by leave of the court. Finally, the name and address of the class representative to which inquiries by the class members may be directed should be included. We recommend that the proposed *Class Actions Act* should expressly require that post-judgment notice provide this information.[111]

(c) General Notice

It is the view of the Commission that the proposed *Class Actions Act* should contain, in addition to provisions relating to post-certification and post-judgment notice, a section permitting the court, in appropriate circumstances, to order notice at any stage of class proceedings.[112] We already have observed that the general notice provision under Rule 23 has been employed for a variety of purposes, the most important of which is to ensure that the interests of class members are adequately represented. We therefore recommend that the proposed *Class Actions Act* should include a "general notice" provision giving the court a discretion, at any time in the action, to order such notice as it considers necessary to protect the interests of the members of the class and the parties or otherwise for the fair conduct of the action.[113] Our recommendation, however, is subject to a crucial *caveat*. In chapter 12, we recommended that general notice should not be used for the purpose of requiring members of the class to take active measures to include themselves in the class action before the determination of the questions common to the class.[114] The section in the proposed *Class Actions Act* dealing with general notice contains a provision to this effect.[115]

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the class members, it was prepared with the assistance of an advertising agency and tested on a group of persons representative of the projected recipients. As it was expected that some class members spoke only Spanish, the administrators of "Operation Money Back" made available claim forms that included instructions in that language. In addition, effective use was made of mass media. See, generally, Bartsh, Boddy, King, and Thompson, *A Class Action Suit That Worked: The Consumer Refund in the Antibiotic Antitrust Litigation* (1978), at 24-28, and Wolfram, "The Antibiotics Class Actions", [1976] ABF Res. J. 251, at 260.

[111] See Draft Bill, s. 17(3).

[112] If, for example, in the course of the class action, the court were to conclude that the class plaintiff was an inadequate representative, it could adjourn the proceedings and order that a notice advise class members of its finding, in order to enable another class member to apply for permission to be a substitute: see discussion *supra*, ch. 8, sec. 4(c)(iv), and see, for example, *Lowenschuss v. C. G. Bluhdorn*, 78 F.R.D. 675 (S.D.N.Y. 1978). In addition, it may be necessary to give notice to the members of the class where the certification order has been amended: see *supra*, ch. 10, sec. 4(c)(ii).

[113] See Draft Bill, s. 18(1).

[114] For a discussion of the impropriety of demanding affirmative action at this stage of the proceedings, see *supra*, ch. 12, sec. 3(a).

[115] See Draft Bill, s. 18(1).

While we believe that the court should have a broad discretion to order general notice, we are of the view that it would be advisable to direct the court to examine the matters that are especially important in determining whether such notice should be sent. To this end, we recommend that, in deciding whether to order notice, the court should consider all relevant matters, including the cost of notice, the nature of the relief sought, the size of the claims of the class members, and the total amount of monetary relief claimed in the action.[116]

With respect to the method or methods by which general notice should be sent, we believe that the approach that we proposed in relation to post-certification notice is appropriate. Hence, we recommend that notice should be given by advertisement, publication, posting, or distribution, unless the court, having regard to the factors mentioned above, believes that notice should be given by some other method.[117]

(d) Court Approval

Earlier in this chapter, we emphasized the practical necessity of ensuring that notice is understood by the class members. A notice replete with legal terms of art and employing legalistic style may be incomprehensible to laypersons. In view of the obvious importance of ensuring that a notice will be understood, we recommend that the proposed *Class Actions Act* should provide that notice should not be given unless the court approves its content.[118] Matters to which the court might address its attention in deciding whether to grant approval include whether the notice is comprehensible and objective. Notice should favour neither the class representative nor the defendant, so that class members can decide whether they will take action without inaccurate assumptions about the merits of the case and the probability of succeeding on their individual claims.

Recommendations

The Commission makes the following recommendations:

1. The proposed Ontario *Class Actions Act* should give the court a discretion, in all types of class action, to order that post-certification notice be given to members of the class informing them of the class action.

2. Where the court has decided to order post-certification notice, it should *prima facie* be given by advertisement, publication, posting, or distribution, unless the court orders notice by some other method, and the court should be empowered to order that notice be given in different ways to various members of the class.

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[116] *Ibid.*, s. 18(2).

[117] *Ibid.*, s. 18(3), including the use of individual notice to a sample portion of the class: see *supra*, note 94.

[118] See Draft Bill, s. 19. We note that §904(c) of the New York Civil Practice Law and Rules (McKinney) provides that "[t]he content of the notice shall be subject to court approval".

3. To provide the courts with guidance concerning whether to order post-certification notice and whether some method of notice other than those specified in Recommendation 2 should be employed, the proposed *Class Actions Act* should require the court to consider, *inter alia*, the following factors:

   (a) the cost of giving notice;

   (b) the nature of the relief sought;

   (c) whether the court has determined that some or all members of the class may exclude themselves from the class action;

   (d) the size of the claims of the members of the class; and

   (e) the total amount of monetary relief claimed in the action.

4. The proposed *Class Actions Act* should provide that post-certification notice should include the following information:

   (a) a brief description of the class action, including the relief claimed;

   (b) a brief description of the class;

   (c) a statement that a member of the class will be bound by any judgment on the questions common to the class;

   (d) if the court has determined that individual members may exclude themselves from the class action, a statement to that effect, indicating how and by what date the members may exclude themselves and the consequences to the members if they exclude themselves or fail to do so;

   (e) a statement that a member of the class may apply to intervene in the class action;

   (f) the name and address of the representative plaintiff to which further inquiries may be directed; and

   (g) any other information that the court considers proper.

5. In order to ensure that members of the class are informed of the steps that they must take to obtain their own recoveries, the proposed *Class Actions Act* should provide that, where the court gives judgment for the class on the questions common to the class, and further proceedings are necessary that require the participation of class members, the court should be required to order that notice of the judgment be given to those members of the class whose participation is required.

6. Unless the court orders otherwise, post-judgment notice should be given by mail to members of the class who are identifiable through reasonable means in terms of expense and effort, and by advertisement, publication, posting, or distribution to members who are not so identifiable.

7. The proposed *Class Actions Act* should provide that post-judgment notice should include the following information:

   (a) a statement informing the members of the class that a judgment on the questions common to the class has been given and that they may be entitled to relief thereunder;

   (b) a statement informing the members of the class of the steps necessary to establish their claims;

   (c) a warning that, upon failure to take such steps, the member will not be entitled to relief, except by leave of the court;

   (d) the name and address of the representative plaintiff to which further inquiries may be directed; and

   (e) any other information that the court considers proper.

8. As a further safeguard, the proposed *Class Actions Act* should contain a general notice provision giving the court a discretion, at any time in the action, to order such notice as it considers necessary to protect the interests of the members of the class and the parties or otherwise for the fair conduct of the action; however, general notice should not be used for the purpose of requiring members of the class to take active measures to include themselves in the class action before a determination of the questions common to the class.

9. The proposed *Class Actions Act* should specify that the court, in deciding whether to order general notice, should be required to consider, *inter alia*, the following factors:

   (a) the cost of giving notice;

   (b) the nature of the relief sought;

   (c) the size of the claims of the members of the class; and

   (d) the total amount of monetary relief claimed in the action.

10. Where the court has decided to order general notice, notice should be given by advertisement, publication, posting, or distribution, unless the court, having regard to the factors set out in Recommendation 9, orders notice by some other method.

11. Notice should not be given unless the court approves its content.

CHAPTER 14

MONETARY RELIEF

1. INTRODUCTION

One of the most contentious class action issues, both in Canada and in the United States, concerns class actions for monetary relief. This is not surprising. Awards of monetary relief have a direct and immediate impact upon the material well-being of the parties. Any change in the law, whether substantive or procedural, that increases the likelihood that one party will obtain a monetary recovery from another, or that influences the amount of that recovery, will inevitably be the object of heated debate between those who will benefit from the change and those who will be left in a less favourable position.

In Ontario and in other parts of the Commonwealth, the debate has revolved around the propriety of permitting the recovery of damages, as opposed to other kinds of monetary relief, in class actions. Until recently, Anglo-Canadian courts have taken the position that all class actions asserting damage claims were improper. By contrast, class suits seeking other kinds of monetary relief, such as an accounting or the enforcement of the monetary terms of a contract, have been allowed to proceed. In more recent years, Ontario courts have demonstrated a willingness to allow the recovery of damages where the relevant amount can be established by common evidence. However, the propriety of individual assessment of damages in separate proceedings involving the defendant remains controversial.

The emphasis of the American debate about monetary relief under Rule 23 of the United States Federal Rules of Civil Procedure[1] has been different. Under that Rule, there is no question that the recovery of damages through individual proceedings following resolution of the common questions is proper, where this will not place unreasonable burdens upon the courts. Instead, the controversy in the United States has revolved around the use of common proof to establish the amounts that class members are entitled to recover from the defendant, and the procedures that may properly be used to distribute any "aggregate" award that results from such a common adjudication of class members' rights to monetary relief.

Ironically, the problems experienced in Ontario are, in some ways, the reverse of those that have arisen in the United States. In cases where

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[1] Fed. R. Civ. P. 23, promulgated at 383 U.S. 1029 (1966).

persuasive evidence is available, Ontario courts have found the efficiency of common proof of damages appealing, but continue to be troubled by the prospect of administering individual assessment proceedings. American courts, by contrast, have developed procedures designed to permit adjudication of individualized monetary issues, although there is considerable uncertainty regarding the propriety of utilizing common evidence to establish the amount of the defendant's liability.

This chapter will examine the Anglo-Canadian jurisprudence relating to the availability of monetary relief in class proceedings in order to identify problems that require correction in a revised Ontario class action procedure. A comparative analysis of American developments in this area will then be undertaken, with a view to the formulation of detailed statutory provisions that incorporate the best features of both Canadian and American experience in these areas.

2. PROPRIETY OF CLASS ACTIONS SEEKING MONETARY RELIEF

(a) The Anglo-Canadian Experience

As indicated previously, the Anglo-Canadian case law concerning monetary relief in class actions has exhibited a preoccupation with the kind of monetary relief that is being sought, as opposed to a functional consideration of whether monetary relief can be effectively administered in a particular class action. This focus is the combined result of the historical origin of class actions in the courts of equity, the obscure and abbreviated language of Rule 75, and the restrictive interpretation placed upon the English equivalent of that Rule by Fletcher Moulton L.J. in the decision of the Court of Appeal in *Markt & Co., Ltd. v. Knight Steamship Co., Ltd.*[2] Most of the subsequent case law has, in fact, been concerned with the application, distinction, or overruling of the *Markt* case.

Because the Anglo-Canadian approach to class actions for monetary relief has been so preoccupied with the form of monetary relief being sought, it will be useful to review briefly the different sorts of monetary relief that a plaintiff might seek.

The various kinds of monetary relief that may be available to a plaintiff in civil proceedings may be divided into a number of broad categories.[3] The best known category is, of course, the action at law for damages. Damages[4]

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[2] [1910] 2 K.B. 1021 (C.A.).

[3] See McGregor, *McGregor on Damages* (13th ed., 1972), at 3-5, and Goff and Jones, *The Law of Restitution* (2d ed., 1978), at 3-5.

[4] With rare exceptions, such as Mandig, "Restitution: A Solution to *Illinois Brick Co. v. Illinois* and to the Manageability Problems of Antitrust and Other Consumer Class Actions" (1976), 18 Ariz. L. Rev. 940, American discussions of monetary relief, in both the cases and the literature, speak exclusively in terms of "damages", without any apparent recognition that all forms of monetary relief do not fall into this category. A similar tendency is apparent in some of the Canadian cases. Such usage is confusing, and is avoided in this Report and in the Draft Bill through the utilization of the generic term "monetary relief".

are payable where a plaintiff has suffered loss because a tort has been committed or there has been a breach of contract. A plaintiff may also be able to recover punitive damages in excess of actual loss in appropriate circumstances.[5] Not all actions for monetary relief involve damage claims, however.

For example, restitutionary causes of action, such as the actions at law for the value of services rendered (*quantum meruit*) or to recover money paid to a defendant under mistake or compulsion ("money had and received") do not involve damage claims. The amount recoverable in such actions is determined by the amount of the defendant's unjust enrichment and not by the amount of the plaintiff's loss.

Monetary relief also may be sought in actions claiming money payable under the terms of a contract.[6] Such actions do not seek damages for breach of contract, but rather attempt to enforce a term of that contract. Actions claiming money in equity, such as the action for an equitable accounting, are also not, technically, damage claims; a cause of action for damages is, by definition, a claim at law.[7] A final category of actions in which a claim for monetary relief is not a claim for damages involves actions asserting a right to money under a statute, where the right created by statute does not involve a tort or contract.[8]

These technical distinctions between types of monetary relief are significant because they have played a critical role throughout much of the history of Anglo-Canadian class actions in determining whether a class action seeking monetary relief would be allowed to proceed.

Class actions were originally created by the courts of equity, so that mere numbers would not prevent large groups of individuals from enforcing their equitable rights where there was a unity of interest.[9] Before the fusion of law and equity, class actions were not available in the courts of law. The forms of monetary relief that could be obtained through class actions were, therefore, restricted to equitable remedies. Damages could not be obtained because they were legal in nature.

The equitable form of monetary relief that has been sought most frequently in class actions is the action for an accounting. Accounting proceedings in equity were very broad and flexible in nature, and frequently

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[5] See *infra*, this ch., sec. 3(c)(vi)a.(1)(C).

[6] Illustrations include actions for goods sold and delivered, or to recover salary, wages, rent, or moneys payable under insurance policies.

[7] Many of the problems that Ontario courts have experienced in allowing class actions for damages, after the class action procedure was extended to courts of law, reflect this historical fact. By contrast, the courts have experienced fewer problems with the equitable action for an accounting, which, like the class action, is a child of equity.

[8] For example, suits claiming the payment of unemployment insurance or welfare benefits from the government in a dispute over the interpretation of the relevant statute would not involve damage claims.

[9] See *supra*, ch. 2, sec. 1(a). See, also, Kazanjian, "Class Actions in Canada" (1973), 11 Osgoode Hall L. J. 397.

included a reference of appropriate issues to a master or referee for determination.[10] In other words, suits for an accounting provided an early precedent for "bifurcated" proceedings,[11] with a judge determining some issues, and a master the others. As will be seen from the subsequent analysis, this equitable remedy is the form of monetary relief whose propriety in Anglo-Canadian class actions is established most clearly.

The earliest case in which a class action seeking an accounting on behalf of a plaintiff class was approved by the Court of Chancery was *Chancey v. May*,[12] which was decided in 1722. Indeed, the *Chancey* decision contained "the first clear recognition of the representative theory which underlies the modern class suit".[13] The pursuit of monetary relief in class suits through the action for an accounting, therefore, would appear to be as old as the class suit itself. Moreover, it appears that the bill for an accounting was the remedy most frequently sought in class actions in equity, and that Chancery was prepared to employ this remedy in situations of great administrative complexity.[14]

Class suits seeking an accounting[15] continued to be brought over the next century and a half. While, for various reasons, some were allowed to proceed and others were not, it should be noted that, in none of the cases, was this decision based on the fact that the relief sought was an accounting of money. Instead, the courts focused upon such issues as whether refusing the class action would effectively deny relief to the injured parties,[16] or whether the class proceedings were necessary as a matter of "practical convenience".[17] In refusing to permit certain class suits to proceed, and insisting that all parties materially interested in the subject of the suit be joined, courts focused upon the possibility of conflicts of interest among the class members,[18] the merits

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[10] See Kazanjian, *supra*, note 9, at 411 and 431-32, *n.* 167.

[11] See *supra*, ch. 11, sec. 2, for the Commission's recommendation regarding bifurcated proceedings.

[12] (1722), Prec. Ch. 592, 24 E.R. 265. In that case, the manager and treasurer of a partnership brought suit "in behalf of themselves, and all other proprietors and partners" against the former treasurers and managers for an accounting of several suspected misapplications and embezzlements. Despite the fact that the eight hundred partners were not all named, the court allowed the suit to proceed.

[13] Kazanjian, *supra*, note 9, at 405.

[14] *Ibid.*, at 411.

[15] See, for example, *Adair v. The New River Company* (1805), 11 Ves. Jun. 429, 32 E.R. 1153; *Good v. Blewitt* (1807), 13 Ves. Jun. 397, 33 E.R. 343; *Cockburn v. Thompson* (1809), 16 Ves. Jun. 321, 33 E.R. 1005; *Jones v. Garcia Del Rio* (1823), Turn. & R. 297, 37 E.R. 1113; *Long v. Yonge* (1830), 2 Sim. 369, 57 E.R. 827; *Small v. Attwood* (1832), You. 407, 159 E.R. 1051; *Evans v. Stokes* (1836), 1 Keen 24, 48 E.R. 215; *Beeching v. Lloyd* (1855), 3 Drew. 227, 61 E.R. 890; and *Wallworth v. Holt* (1841), 4 My. & Cr. 619, 41 E.R. 238 (subsequent references are to 41 E.R.).

[16] See *Good v. Blewitt*, *supra*, note 15, and *Wallworth v. Holt*, *supra*, note 15.

[17] *Cockburn v. Thompson*, *supra*, note 15, and *Small v. Attwood*, *supra*, note 15.

[18] *Long v. Yonge*, *supra*, note 15, and *Evans v. Stokes*, *supra*, note 15.

of the cause of action,[19] and whether the claims showed sufficient "commonality".[20]

Many of the early equity cases reflect the view of Lord Chancellor Cottenham in *Wallworth v. Holt*[21] that the class action mechanism was sufficiently broad and flexible that it could, and should, be adapted to apply to new situations.[22] This flexible approach to class actions, however, did not survive the fusion of law and equity.

The fusion of law and equity in late nineteenth century England was a critical development for the law of class actions, resulting in the codification of the class action procedure in a provision, Rule 10 of the Rules of Procedure scheduled to the *Supreme Court of Judicature Act, 1873*,[23] that was the precursor of present Ontario Rule 75.[24] The adoption of this provision raised two related issues. First, to what extent would the class action procedure, which had been developed in the equity courts, be applied to legal causes of action for monetary relief, such as claims for damages, or to proceedings asserting a quasi-contractual restitutionary right, such as an action for money had and received? And, secondly, to what extent had the codification modified the earlier equity jurisprudence in this area?

In chapter 2 of this Report, we traced the history of class actions in England and Ontario following the fusion of law and equity. It will be recalled that initially in England, in two judgments rendered in 1901, the House of Lords evinced a liberal approach to class actions.[25] In *Duke of Bedford v. Ellis*,[26] Lord Macnaghten clearly indicated that the correct approach to the codified provision was the more flexible, pre-fusion equity approach to representative actions, with its emphasis on the need to adapt class action practice to new situations. Lord Shand, in his judgment, emphasized the utility of class actions as a means of avoiding a multiplicity of actions, and gave additional support to the proposition that the Chancery

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[19] *Adair v. The New River Company*, *supra*, note 15.

[20] *Jones v. Garcia Del Rio*, *supra*, note 15. Compare *Beeching v. Lloyd*, *supra*, note 15.

[21] *Supra*, note 15. See, also, *Taylor v. Salmon* (1838), 4 My. & Cr. 134, 41 E.R. 53. But see *Beeching v. Lloyd*, *supra*, note 15, where the Court displayed a narrow, technical approach to class actions. The Court held that the mere existence of a common question was not sufficient to permit an action to proceed in class form. Rather, there had to be some tie among class members, such as a claim against a "common fund" or a pre-existing legal relationship.

[22] *Wallworth v. Holt*, *supra*, note 15, at 244-45.

[23] 36 & 37 Vict. c. 66 (U.K.). The wording of the English Rule up until 1965 was substantially the same as the present Ontario Rule 75, which was first enacted in 1881, and attained its present form in 1913.

[24] Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540.

[25] *Duke of Bedford v. Ellis*, [1901] A.C. 1, [1900-03] All E.R. (H.L.) (subsequent references are to [1901] A.C.), and *Taff Vale Railway Company v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 (H.L.). See *supra*, ch. 2, sec. 2(a).

[26] *Supra*, note 25, at 8 and 10-11. See, also, *Taff Vale Railway Company v. Amalgamated Society of Railway Servants*, *supra*, note 25, at 443.

practice with respect to class actions should be carried over into the courts of law.[27]

This liberal approach to class actions was short-circuited, however, by the decision of Fletcher Moulton L.J. in *Markt & Co., Ltd. v. Knight Steamship Co., Ltd.*[28] In refusing to allow the class action to proceed, Fletcher Moulton L.J. took the position that the new provision did not apply the equity practice relating to class actions to actions at law, but rather involved a codification of the law so that its language would displace pre-fusion equity practice if there was any inconsistency.[29]

Moreover, Fletcher Moulton L.J. emphatically rejected the proposition that any kind of damages could be recovered through a class action under the "codified" provision.[30] This rejection was based partly on the potential of a class action to bind class members without their consent, and on the inability of the defendant to obtain discovery or costs from class members.[31] It also reflected Lord Justice Fletcher Moulton's view that all damage claims are personal in nature and must be proved separately.[32] Much of Lord Justice Fletcher Moulton's concern with class actions for damages appears to reflect the practical problems of administering the class action fairly. The abbreviated format of the class action provision provided little assistance to a court concerned with problems of adequacy of representation, or with the difficulties of fairly resolving individual questions that may flow from the class proceedings.

Fletcher Moulton L.J. also rejected the *Markt* class action on the independent ground that the claims of the class members were based upon separate contracts and, accordingly, did not satisfy the "same interest" requirement of Order XVI, Rule 9, the then class action Rule. It may be noted that the denial of any right to bring a class action based upon separate contracts would indirectly restrict the right to bring class actions for damages almost as severely as an express prohibition, since, by definition, damages can arise only from a breach of contract or from a tort.

In subsequent case discussion of the *Markt* decision, the fact that Fletcher Moulton L.J.'s judgment was not a majority decision is often overlooked. Although Vaughan Williams L.J. concurred in the result in the particular case – because of the lack of any legal connection among the contractual claims of the class members – he was willing to entertain the possibility of damage class actions giving rise to "bifurcated" individual

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[27] *Duke of Bedford v. Ellis*, *supra*, note 25, at 14.

[28] *Supra*, note 2. For a discussion of this case, see *supra*, ch. 2, sec. 2(a).

[29] *Ibid.*, at 1038. Vaughan Williams L.J. agreed with Fletcher Moulton L.J. on this point: *ibid.*, at 1028-29.

[30] *Ibid.*, at 1036-42.

[31] *Ibid.*, at 1039-40.

[32] *Ibid.*, at 1040-41.

proceedings for monetary relief where a "common purpose" could be identified.[33]

Buckley L.J., in dissent, would have applied the flexible approach of the pre-fusion equity courts to damage and other legal claims at law, and would have permitted the *Markt* class action to proceed.[34] He noted that, as a practical matter, shippers have a "common interest" in having the vessel on which their goods are carried observe the duty of not carrying contraband of war, which might be enforced by a declaration that the defendants were liable for having breached that duty. Rights to individual relief could then be determined through separate, individual proceedings, similar to those that had been utilized in class actions for an accounting under equity practice. Buckley L.J. rejected the contention that class actions were improper because of the presence of separate contracts; he noted that the rights of the parties had arisen under separate contracts in most, if not all, representative actions, giving the example of a creditor's action for administration.

Thus, although Fletcher Moulton L.J. and Vaughan Williams L.J. were in agreement that the presence of separate contracts made a class action inappropriate in the circumstances of the case,[35] both Vaughan Williams L.J. and Buckley L.J. agreed that the need for individual resolution of some issues would not bar a class action in all circumstances. Moreover, Fletcher Moulton L.J. stood alone in rejecting class actions for damages in all cases. Nevertheless, during the early part of this century courts tended to treat the decision of Fletcher Moulton L.J. as embodying the law to be applied to class actions, despite the fact that this decision did not command majority support in all respects and that, moreover, it was inconsistent in spirit with the decision of the House of Lords in *Duke of Bedford v. Ellis*, which advocated a flexible approach to class actions.

In Ontario, until the 1970's, there was almost uniform adherence to the view expressed in *Markt* that the existence of separate contracts or the presence of a claim for damages was sufficient to bar the bringing of an action in class form.[36] Indeed, the Ontario courts went further and rejected the propriety of class actions asserting a legal claim for money had and

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[33] The case of *Beeching v. Lloyd, supra*, note 15, does show that, where there is a common purpose, a plaintiff may sue in a representative capacity, even though each party to the common purpose will have to show individually that he personally was induced by the fraud alleged. See, also, *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.*, [1980] 2 W.L.R. 339, [1979] 3 All E.R. 507 (Ch.), discussed *supra*, ch. 2, sec. 2(a).

[34] *Supra*, note 2, at 1043-45 and 1047-48.

[35] Indeed, Fletcher Moulton L.J. was prepared to say that a class action could never be brought where the claims of the members of the class were based on separate contracts with the defendant: *ibid.*, at 1040.

[36] For cases concerning the separate contracts issue, see *Shields v. Mayor*, [1953] O.W.N. 5, [1953] 1 D.L.R. 776 (C.A.), and *Preston v. Hilton* (1920), 48 O.L.R. 172, 55 D.L.R. 647 (H.C. Div.). See, also, *Agnew v. Sault Ste. Marie Board of Education* (1976), 2 C.P.C. 273 (Ont. H.C.J.).

For cases concerning the damages point, see *Preston v. Hilton, ibid.*, and *Turtle v. City of Toronto* (1924), 56 O.L.R. 252 (App. Div.). But compare *Bowen v. MacMillan* (1921), 21 O.W.N. 23 (H.C. Div.).

received.[37] Even at this stage, however, the Ontario courts were not prepared to rule that class actions seeking all kinds of monetary relief were improper. In *A.E. Osler & Co. v. Solman*,[38] a class action seeking enforcement of a joint contract for payment of money, as opposed to damages for its breach, was allowed to proceed.

The past decade, by contrast, has been marked by a steadily increasing sympathy among Canadian courts to class actions seeking monetary relief, and by a struggle to find ways to distinguish or overrule Fletcher Moulton L.J.'s decision in *Markt*. Indeed, as discussed in some detail in chapter 2, the existence of separate contracts is no longer an absolute bar to the maintenance of a class action in Ontario;[39] moreover, it is now clear that, in some circumstances, damages may be claimed in a representative action.

In those cases where the courts have permitted an action claiming damages to proceed in class form, the key has been the existence of common proof or evidence by which the total liability of the defendant could be established without the need to resort to individual assessment of damages. The courts to date have approved this procedure in three kinds of case: where a lump sum owing to the class can be established by common evidence;[40] where the damages claimed on behalf of each member of the class is identical;[41] and where the amount claimed is readily ascertainable, for example, by mathematical calculation.[42]

Although recent decisions of the Ontario Court of Appeal have introduced a much greater degree of flexibility into the determination of the propriety of class actions seeking monetary relief than was apparent in the early part of the twentieth century, there still remains a tendency for Ontario courts to make such decisions on the basis of broad categories, instead of on a case-by-case basis. The dividing line is no longer between all class actions seeking damages and class actions seeking other forms of monetary relief, such as an accounting, but rather between class actions for damages in which there is a need for individual damage assessments or the possibility of individual defences, and those where some form of common proof relating to the damage issue is possible.[43]

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[37] *Johnston v. Consumers' Gas Company of Toronto* (1896), 23 O.A.R. 566 (C.A.).

[38] (1926), 59 O.L.R. 368, [1926] 4 D.L.R. 345 (App. Div.).

[39] See *Cobbold v. Time Canada Ltd.* (1976), 13 O.R. (2d) 567, 71 D.L.R. (3d) 629 (H.C.J.), dismissed at trial (1980), 28 O.R. (2d) 326, 109 D.L.R. (3d) 611 (H.C.J.), and *Naken v. General Motors of Canada Ltd.* (1978), 21 O.R. (2d) 780, 92 D.L.R. (3d) 100 (C.A.) (subsequent references are to 21 O.R. (2d)). But see *Stephenson v. Air Canada* (1979), 26 O.R. (2d) 369, 103 D.L.R. (3d) 148 (H.C.J.), aff'd unreported (February 10, 1981, Ont. C.A.).

[40] See, for example, *Farnham v. Fingold*, [1973] 2 O.R. 132, 33 D.L.R. (3d) 156 (C.A.) (subsequent references are to [1973] 2 O.R.).

[41] See, for example, *Naken v. General Motors of Canada Ltd.*, *supra*, note 39.

[42] See, for example, *Cobbold v. Time Canada Ltd.*, *supra*, note 39.

[43] See, for example, *Stephenson v. Air Canada*, *supra*, note 39; *Loader v. Rose Park Wellesley Investments Ltd.* (1980), 29 O.R. (2d) 381, 114 D.L.R. (3d) 105 (H.C.J.); and *Seafarers International Union of Canada v. Lawrence* (1979), 24 O.R. (2d) 257, 97 D.L.R.

The arbitrary results that can occur from the use of such a categorical approach can be demonstrated through a comparison of the results of two cases, *Chastain v. British Columbia Hydro and Power Authority*,[44] a decision of the British Columbia Supreme Court, and *Johnston v. Consumers' Gas Company of Toronto*,[45] a decision of the Appellate Division of the Ontario Supreme Court. Both cases were utilities class actions in which distribution of amounts to which consumers were entitled could be accomplished easily through the use of the defendants' ordinary billing processes. Yet, the *Chastain* case was allowed to proceed as a class suit, because the representative plaintiff had sufficient ingenuity to force the suit into the framework of an equitable claim for a mandatory injunction, while the Court in *Consumers' Gas* indicated that it would have denied class status because it believed that the case asserted what was, in essence, a legal cause of action for money paid. Similarly, in *Shaw v. Real Estate Board of Greater Vancouver*,[46] the British Columbia Court of Appeal allowed a class action to proceed despite the potential for individualized proceedings that might seriously burden the courts, because it had been framed to claim an accounting rather than damages. In Ontario, on the other hand, a class action in which individual proceedings relating to the assessment of damages are required would automatically be denied class status, even if the individual proceedings would be easy to administer in comparison to the individual accounting proceedings in *Shaw*.[47] The fact that a particular kind of relief originated in law or equity, or that a particular suit may or may not require individual determinations as to particular issues, does not seem to this Commission to provide a rational basis for deciding when a class action is proper.

In large measure, the problems that Anglo-Canadian courts have experienced in this area can be traced to the terse and obscure language of Rule 75. The Rule merely states that the proper basis for class actions is that numerous persons have "the same interest". As was indicated in chapter 2, the phrase "same interest" is capable of various interpretations. None of these interpretations gives any real sense of how the propriety of a particular class action is likely to be assessed. Therefore, it is understandable that the courts have been driven to generalizations respecting the propriety of particular kinds of monetary relief in class actions. To the extent, however, that such generalizations, based upon matters of form, yield arbitrarily different results in cases that are essentially similar in the burdens that they impose upon the courts, this approach is unsatisfactory.

The problems arising from the language of Rule 75 are exacerbated by

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(3d) 324 (C.A.). The adoption of such an "individual assessment" dividing line is also apparent in the recent Alberta cases of *Goodfellow v. Knight* (1977), 5 A.R. 573, 2 C.P.C. 209 (S.C., T.D.), at 213, and *United Assoc. of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Canadian Broadcasting Corp.* (1979), 17 A.R. 396, 97 D.L.R. (3d) 56 (S.C., T.D.), at 62.

[44] (1972), 32 D.L.R. (3d) 443, [1973] 2 W.W.R. 481 (B.C.S.C.).

[45] *Supra*, note 37.

[46] (1973), 36 D.L.R. (3d) 250, [1973] 4 W.W.R. 391 (B.C.C.A.), dismissed at trial [1974] 5 W.W.R. 193 (B.C.S.C.).

[47] See *Preston v. Hilton, supra*, note 36, and *Turtle v. City of Toronto, supra*, note 36.

the omission from the Rule of any provision designed to afford guidance to the courts with respect to the range of their discretion in developing techniques to administer effectively common and individual issues in class actions. Although the Ontario Court of Appeal in *Naken v. General Motors of Canada Ltd.*[48] certainly seems to have contemplated the possibility of developing procedures to handle individual issues in class actions, the more recent Ontario cases do not show any strong predisposition to take advantage of these opportunities where there must be individual assessments of damages.[49]

(b) The United States Experience under Rule 23

In contrast to the problems experienced by Anglo-Canadian courts, the United States federal courts, operating under Rule 23 of the Federal Rules of Civil Procedure, have never shown any predisposition to determine the propriety of class actions for damages, or for any other form of monetary relief, on a categorical basis. Instead, the appropriateness of particular class actions for monetary relief is determined on a case-by-case basis, in an effort to determine whether the benefits of the particular class action, including the monetary relief to be provided to class members, outweigh the costs, including the burdens to be placed upon the courts. In the words of the Court in *Shaw v. Mobil Oil Corp.*,[50] the question is whether the proof of the various elements of the cause of action will be "so similar for all members of plaintiff's proposed class that 'a class action would achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results' ". The American courts are assisted in making this determination by the fact that Rule 23 provides a much more detailed set of criteria to aid them than does Ontario Rule 75.

As indicated in chapter 8, the common questions requirement of Rule 23,[51] unlike the "same interest" requirement of Rule 75, does not present an automatic barrier to class actions seeking damages that must be assessed on an individual basis following the resolution of common questions. This does not mean, however, that American courts always allow such class actions to proceed. Indeed, such class actions are subjected to intensive examination on a case-by-case basis to determine whether they meet the more detailed requirements of Rule 23(b), which govern the issue of whether class actions are maintainable.

Most class actions for monetary relief have been brought under Rule 23(b)(3), which provides rigorous standards for certification. This provision specifically directs that, in determining whether a class action commenced under subdivision (b)(3) should be certified, a judge should consider whether

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[48] *Supra*, note 39. The case is discussed in some detail *supra*, ch. 2, sec. 2(c)(ii)a. and b.

[49] See *supra*, note 43.

[50] 60 F.R.D. 566 (D.N.H. 1973), at 569.

[51] See *supra*, ch. 8, sec. 3(b).

"questions of law or fact common to the members of the class predominate over any questions affecting only individual members". It is well established that this test does not operate as an automatic bar to all class actions in which individual issues relating to damages, or, indeed, other matters, exist. Instead, the presence of such issues is a factor to be weighed in the context of the particular case.[52]

This is not to say that damage issues are not relevant to the question whether common questions predominate. American courts can and do refuse to certify class actions on the ground that individual damage issues are so complex and difficult that they outweigh the common issues in the class action. They do so, however, on the basis of the facts of each particular case, with a view to ascertaining whether the problems of determining monetary relief, and any other relevant issues that require individualized treatment, outweigh the elements of the particular cause of action that can properly be determined as common questions.

American courts are most likely to hold that the predominance requirement is not met where it appears that the case will require individualized treatment of both issues of "liability" and issues of "damages".[53] In such cases, the fact that there are issues relating to assessment of damages is merely one of a series of cumulative factors, although this fact does play an important role in influencing judicial decisions. Courts are far less likely to find that common questions do not predominate because of a claim for damages where the only individualized issues relate to the amount of damages,[54] although in such situations the court may still find that the class action should not be allowed to proceed because it is "unmanageable".

The second criterion set out in Rule 23(b)(3) that has played an important role in determining which class actions for monetary relief should be allowed to proceed is the requirement that the particular class action be "superior to other available methods for the fair and efficient adjudication of the controversy".[55] Rule 23 enumerates four non-exhaustive factors relevant to the "superiority" determination. The factor that has played the greatest role in the decisions of the United States federal courts respecting the propriety of class actions is that set out in Rule 23(b)(3)(D), namely, "the difficulties likely to be encountered in the management of a class action".

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[52] See, for example, *Wolgin v. Magic Marker Corp.*, [1979] C.C.H. Securities Law Reports ¶96,830 (E.D. Pa.), at ¶95,333. For examples of other cases in which courts have made similar observations, see *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969), at 128; *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968), at 566 (hereinafter referred to as "*Eisen II*"); *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D. Cal. 1978), at 120; *State of Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969), at 489; and *Milberg v. Lawrence Cedarhurst Federal Savings and Loan Association*, 68 F.R.D. 49 (E.D.N.Y. 1975), at 52.

[53] See, for example, *Schaffner v. Chemical Bank*, 339 F. Supp. 329 (S.D.N.Y. 1972), at 334-35 (antitrust securities case); *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 64 F.R.D. 43 (D. Del. 1974), at 54 (antitrust case); *Boring v. Medusa Portland Cement Co.*, 63 F.R.D. 78 (M.D. Pa. 1974), at 84-85 (pollution case); and *Shaw v. Mobil Oil Corp.*, *supra*, note 50, at 569 (antitrust case).

[54] See, for example, *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), at 456.

[55] The "superiority" requirement is discussed *supra*, ch. 9, sec. 2.

Again, there has been no apparent suggestion in the American jurisprudence that class actions for monetary relief are inherently superior or inferior to other available means of providing the same relief, or that such proceedings are inherently "unmanageable". Instead, the courts have endeavoured to determine whether the benefits to be achieved by a particular class action, in terms of monetary or other relief, outweigh the burdens that it is likely to impose upon the parties or the courts.

The American courts have made very effective use of the "manageability" requirement to weed out class actions that they view as unduly burdensome or lacking in social utility. The flexibility of the American approach to "superiority", with its functional, policy-oriented, case-by-case analysis, appears to be of greater utility than the Anglo-Canadian "across-the-board" approach to particular categories of monetary relief.

The willingness of American courts to undertake a functional analysis reflects not merely the more detailed and policy-oriented criteria for certification set out in the text of Rule 23, but also the fact that the Rule contains provisions that suggest to judges administering class actions that they have a considerable measure of discretion in shaping the procedures to be used in the particular class actions before them,[56] including the use of "bifurcated" proceedings.[57]

(c) Conclusion and Recommendations

A comparison of the provisions of Rule 75 of the Supreme Court of Ontario Rules of Practice and Rule 23 of the United States Federal Rules of Civil Procedure, as they have been applied to class actions for monetary relief, can yield no conclusion other than that Rule 23 is by far the more flexible and sophisticated mechanism. Courts applying Rule 23 endeavour to ascertain whether the particular class action will serve any useful function, in the light of the facts and issues of the particular case, or whether it will be a waste of the resources of the courts and the parties. Ontario courts applying Rule 75, by comparison, have rejected broad categories of class action on the basis of the nature of the relief sought. The end result is that class actions that are inappropriate from a cost-benefit point of view may be allowed to proceed if they fall into the "right" category, while others that could be administered by the courts with little difficulty may be rejected if they happen to seek the "wrong" form of relief.

The Ontario Court of Appeal in recent years appears to have been working toward a more functional approach, but even it seems to have drawn the line, at the present time, at permitting class actions involving the assessment of individual damages. Although such class actions are, indeed, more likely to be "unmanageable" than those in which damages can be determined, in whole or in part, through common proceedings, the American experience suggests that this will not always be the case: even this category of rejected class actions, from a functional viewpoint, may be too broad.

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[56] Fed. R. Civ. P. 23(d).

[57] Fed. R. Civ. P. 23(c)(4)(A).

The Commission has concluded that a revised Ontario class action procedure should reject the categorical approach to class actions for monetary relief that is characteristic of the existing Anglo-Canadian case law. In the opinion of the Commission, a flexible, case-by-case approach, of the kind utilized by the American courts under Rule 23, should be embodied in the proposed *Class Actions Act*. In this respect, the proposals of the Law Reform Committee of South Australia should be noted. Section 3(5) of the Draft Bill for a Class Actions Act proposed by the South Australia Law Reform Committee[58] provides that a court should not refuse to certify a class action merely because the relief sought includes a claim for damages, or because such damages will require individual assessment. The South Australia Draft Bill also states that the fact that the relief sought relates to separate contracts or transactions should not constitute an automatic bar to class action status.

The Commission has proposed the adoption of a common questions requirement to take the place of the present "same interest" test in Rule 75.[59] In addition, we recommended in chapter 11 the inclusion in the proposed *Class Actions Act* of a provision specifically authorizing the bifurcation of class proceedings.[60] Nevertheless, we believe that it is useful to reject expressly the long line of authorities, ending with the recent decision of the Court of Appeal for Ontario in *Stephenson v. Air Canada*,[61] that prohibits class actions necessitating individual assessments of damages.

We therefore recommend that a provision should be included in the proposed *Class Actions Act* to the effect that certification of an action as a class action should not be refused solely on the ground that the relief claimed includes a claim for damages that will require individual assessment in subsequent proceedings involving the defendant.[62] As a corollary, we recommend that the mere fact that the relief claimed arises out of or relates to separate contracts between members of the class and the defendant should not, in and of itself, constitute grounds for denying certification.[63]

3. AGGREGATE ASSESSMENT OF MONETARY RELIEF AND DISTRIBUTION OF AGGREGATE AWARDS

(a) Introduction

The preceding analysis has focused upon the proposition that the initial

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[58] Law Reform Committee of South Australia, "Draft Bill for a Class Actions Act", in *Thirty-sixth Report Relating to Class Actions* (1977), at 12, s. 3(5) (hereinafter referred to as "South Australia Draft Bill"). Compare Williams, "Model Consumer Class Actions Act", in "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L. J. 1, at 68, s. 3(4), and *An Act to Amend the Combines Investigation Act*, Bill C-42, 1977 (30th Parl. 2d Sess.), s. 39.12(4) (hereinafter referred to as "Bill C-42").

[59] See *supra*, ch. 8, sec. 3(c)(v).

[60] See *supra*, ch. 11, sec. 2.

[61] *Supra*, note 39.

[62] See Draft Bill, s. 7(*a*).

[63] *Ibid.*, s. 7(*b*).

decision concerning the propriety of a class action for monetary relief should be made on a case-by-case basis. In the remainder of this chapter, we shall deal with the broad range of techniques that might be of assistance to a court presiding over the assessment and distribution of monetary relief in an action that has been certified as a class action. More specifically, we shall consider, first, the question whether and, if so, in what circumstances the total amount of the monetary relief that is owing to class members may properly be determined as a common question. Secondly, we shall explore the range of techniques that might be used to distribute any such aggregate award.

The means of treating monetary relief as a common question that has received the greatest support from proponents of class actions is the technique known as "aggregate assessment". This involves a determination, in a single proceeding, of the total amount of monetary relief to which the class members are entitled, where the underlying facts permit this to be done with an acceptable degree of accuracy. Judgment is given for the aggregate amount, and the resulting award is then distributed in proceedings to which the defendant need not be a party. It is argued that the adversarial participation of the defendant in the distribution process is not essential, because the measure of the harm for which the defendant has been held responsible, or the amount by which the defendant has been unjustly enriched (if the claim is restitutionary), has been determined in proceedings in which the defendant could fully contest his liability. It should be noted that an aggregate assessment of monetary relief is necessarily unique to class actions, since judicial economies of this kind, by definition, cannot be achieved where the court is dealing with individual litigants.

The availability of common proof with respect to claims for monetary relief will have an indirect influence upon the certification process. If, for example, the damages suffered by class members can be proved with acceptable accuracy in a single proceeding, the possibility that common questions will be held to predominate[64] is obviously greater than if damages can only be assessed through detailed evidence from each class member. Similarly, the employment of a "common question" assessment of monetary relief may reduce the possibility that particular class actions will be found to be "unmanageable" because of the burdens they place upon the courts, or because the costs of administration may consume the entire recovery of the class members. To the extent, therefore, that such procedures allow certain class actions to proceed that would otherwise have been refused certification on grounds of "lack of predominance" or "unmanageability" under Rule 23, they have the potential to permit the maintenance of a greater number of class actions.

The position of the critics of aggregate assessment is simple. They would apply exactly the same procedures to class actions for monetary relief as apply to nonclass suits asserting monetary claims. Thus, they would require separate, individual proof from each class member in a series of "mini-trials" before a judge or a judge and jury, or perhaps, in some cases, a master,

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[64] See *supra*, ch. 8, sec. 3(c)(v), and ch. 9, sec. 3(b)(ii)a.

complete with pre-trial discovery, *viva voce* testimony, and cross-examination.[65] Aggregate assessment, class action critics contend, is unfair to defendants because the traditional procedures are not employed. This unfairness argument is considered in more detail in a later section of this chapter.[66] It should be noted, however, that resort to "mini-trials" may well have the effect in some cases of rendering large class actions so unmanageable that certification will be denied. In addition, the use of such a procedure will often result in fewer class members coming forward to claim their relief, with a corresponding reduction in the defendant's total liability.

Proponents of class actions who disagree with this position do so partially on the basis of different factual assumptions, and partially due to a concern that a plethora of individual proceedings may result in a denial or reduction of recovery to class members, or may be detrimental to the public interest.

Insofar as the factual issue is concerned, there is agreement that there are cases in which the injuries to class members will be so varied that individual proceedings to determine monetary relief are essential.[67] However, it is suggested that this will not always, or even usually, be the case. In many circumstances, the factual nature of the mass wrongs that give rise to class actions will be such as to permit the treatment of damages, as well as other elements of liability, as a common question.

With respect to the issue of the harm to class members and the public, commentators point to four disadvantages of requiring individual proceedings of the sort advocated by critics of aggregate assessment. First, it is suggested that denial of certification, on the ground that the burdens that mandatory "mini-trials" impose upon the courts and the parties render the action "unmanageable", will have the effect of denying recovery to all persons whose claims are individually nonrecoverable.[68]

Secondly, even where the "mini-trial" requirement does not render a class action unmanageable, it is argued that imposing this procedure where it

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[65] See Handler, "The Shift from Substantive to Procedural Innovations in Antitrust Suits – The Twenty-Third Annual Antitrust Review" (1971), 71 Colum. L. Rev. 1, at 7-8.

[66] See *infra*, this ch., sec. 3(b)(iv).

[67] In the case of a class action arising out of a fatal airplane crash, for example, it would still be necessary, following the common determination of liability, to have "mini-trials" with respect to damages, because the passengers are likely to vary widely in their occupations and incomes, with the result that damages will also be highly variable. In such a situation, there would be no injustice, since the amounts at stake are likely to be individually recoverable, and the surviving relatives are likely to retain counsel to represent them; the burden upon the court would also not be unreasonable, since in such a situation individual suits would likely be brought if no class action were available, and judicial damage determinations in such actions would be mandatory, even if the impact upon the courts was highly burdensome.

[68] See, for example, *Riley v. New Rapids Carpet Center*, 294 A.2d 7 (N.J. Sup. Ct. 1972), at 10; Note, "Management Problems of the Class Action Under Rule 23(b)(3)" (1972), 6 U. San Francisco L. Rev. 343, at 363 (hereinafter referred to as "Management Problems Under Rule 23(b)(3)"); and Federal Judicial Center, Board of Editors, *Manual for Complex Litigation* (1978) (Clark Boardman), §1.43, at 62-63 (hereinafter referred to as "Manual").

is not essential may cause an unnecessary reduction in compensation to class members.[69] A strict requirement for individual trials effectively denies relief to those members of the class whose claims are rendered "nonviable"[70] because they cannot afford to take leave from work to assert their claims,[71] or because the cost of hiring a lawyer to represent them in discovery and trial proceedings exceeds the amount at issue.[72] Others may be unable to litigate claims because of the psychological or social barriers described at an earlier stage of this Report,[73] or because they lack documentary proof on crucial issues.[74] To the extent that common proof is feasible, and effective techniques can be devised to overcome these barriers in distributing an aggregate award, a greater measure of compensation may be possible than would be the case if formal "mini-trials" were required in every case.

Thirdly, it is contended that the inability of class members to assert their claims effectively under a "mini-trial" system, and denial of certification to class actions involving disputes over relatively small amounts on the ground of unmanageability, is contrary to the public interest. Advocates of this position[75] generally are concerned that these barriers to the assertion of valid claims will result in unjust enrichment in some cases by allowing wrongdoers

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[69] See Newberg, *Newberg on Class Actions* (1977), Vol. 3, §4620, at 84-85; Schwing, "Eisen v. Carlisle & Jacquelin – Fluid Recovery, Minihearings and Notice in Class Actions" (1974), 54 B.U. L. Rev. 111; Note, "Managing the Large Class Action: *Eisen v. Carlisle & Jacquelin*" (1973), 87 Harv. L. Rev. 426 (hereinafter referred to as "Managing the Large Class Action"); Comment, "Due Process and Fluid Class Recovery" (1974), 53 Ore. L. Rev. 225 (hereinafter referred to as "Due Process and Fluid Class Recovery"); and Comment, "Manageability of Notice and Damage Calculation in Consumer Class Actions" (1971), 70 Mich. L. Rev. 338 (hereinafter referred to as "Manageability of Notice and Damage Calculation").

[70] A claim is nonviable where the expenses of claiming a share of a class action recovery exceeds the size of the share: see Note, "Developments in the Law – Class Actions" (1976), 89 Harv. L. Rev. 1318, at 1356 (hereinafter referred to as "Harvard Developments"). The dividing line between individually nonrecoverable claims and nonviable claims in a given class action will vary with the cost of the procedures that class members are obliged to follow in claiming a share of the recovery. If the assistance of a lawyer is required to assert the claim, for example, the number of claims that will be rendered nonviable will be much greater than if all that is necessary is to fill in a standardized proof of claim form that specifies the amount required, or if cheques can be mailed out directly to class members without requiring any action on their part.

[71] See Landers, "Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma" (1974), 47 So. Calif. L. Rev. 842, at 863-64.

[72] See, for example, Wright and Miller, *Federal Practice and Procedure* (1972), Vol. 7A, §1784, at 121, and Gordon, "Manageability under the Proposed Uniform Class Actions Act" (1977), 31 Sw. L. J. 715, at 724.

[73] See discussion *supra*, ch. 4, sec. 3(a)(ii)b.

[74] Manageability of Notice and Damage Calculation, *supra*, note 69, at 363.

[75] See, for example, Manual, *supra*, note 68, §1.43, at 63-65. See, also, Deems, "The *Cy Pres* Solution to the Damage Distribution Problems of Mass Class Actions" (1975), 9 Ga. L. Rev. 893, at 923; Newberg, *supra*, note 69, §4620, at 84; Shlachter, "The Case for the Fluid Class Recovery" (1972), 1 C.A.R. 70; Shepherd, "Damage Distribution in Class Actions: The Cy Pres Remedy" (1972), 39 U. Chi. L. Rev. 448; Gordon, *supra*, note 72, at 733-34; Gould, *Staff Report on the Consumer Class Action Submitted to the National Institute for Consumer Justice* (1972), at 201; and Scott, "Two Models of the Civil Process" (1975), 27 Stan. L. Rev. 937, at 940-45.

to keep the fruits of their wrongdoing.[76] In addition, they are concerned that, even where there is no unjust enrichment, these barriers may interfere with the ability of the civil law to modify harmful behaviour through the imposition of appropriate costs upon defendants.

Fourthly, it is argued that imposing a strict requirement for "mini-trials" where full scale trial proceedings are not necessary to ensure a just result is unfair to the courts and to other litigants because of the amount of judicial time consumed.[77]

The theory of aggregate assessment of monetary relief commands support both from commentators whose major concern is securing a greater measure of compensation for class members, and from those whose primary objective is modifying harmful behaviour: a distribution of funds recovered from a defendant for the benefit of class members incidentally will prevent unjust enrichment or impose appropriate costs upon the defendant, and thus will serve an effective deterrent function as well.[78] Where the two schools of thought diverge is over the issue of what is to be done where it is impossible to apply all of an aggregate award for purposes that will effectively benefit the class.

In such a situation, an approach to the problem that is concerned exclusively with the provision of compensatory or restitutionary relief to class members would require the residue of the aggregate award to be returned to the defendant, since no further benefit could be conferred upon the class members as redress for their wrongs.[79] Commentators who view the primary function of the class action as deterrence, on the other hand, believe that such a result should be avoided, since a defendant who has been found liable would thereby be allowed to retain part of the "pot of gold"[80] arising from his misconduct. Nor would the defendant be subject to an appropriate measure of cost internalization; therefore he would have no financial incentive to modify his wrongful behaviour.[81] Adherents to this point of view suggest that

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[76] It may be noted here that references to unjust enrichment in this context are not restricted to restitutionary claims in the technical sense, but extend to cases where the defendant is incidentally enriched in situations where the proper measure of relief is compensatory. For a discussion of the overlap between unjust enrichment and compensation, see *infra*, this ch., sec. 3(c)(iv)a.(1)(B).

[77] See, for example, Wright and Miller, *supra*, note 72, §1784, at 122-23. See, also, Manageability of Notice and Damage Calculation, *supra*, note 69, at 372-73.

[78] Moore, "The A.B.A., The Congress and Class Actions: A Report" (1974), 3 C.A.R. 36, at 55: "If the entire class damage recovery is distributed to class members, the deterrent effect is entirely a by-product of the compensation function, an added benefit that would be obtained whether or not deterrence were explicitly recognized as a proper class action objective."

[79] *Ibid.*

[80] "The court would be hesitant to conclude that conspiring defendants may freely engage in predatory price practices to the detriment of millions of individual consumers and then claim the freedom to keep their ill-gotten gains which, once lodged in the corporate coffers, are said to become a 'pot of gold' inaccessible to the mulcted consumers because they are many and their individual claims small": *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y. 1971), at 282-83, *per* Lord J.

[81] See Moore, "The Potential Function of the Modern Class Suit" (1973), 2 C.A.R. 47, at 53.

the residue should be applied to help defray costs imposed by class actions or should be forfeited to the government.[82]

Most of the American commentary[83] relating to aggregate assessment is of limited usefulness for our purposes, since it has centred on two questions. The first is whether this procedure violates the constitutional rights to trial by jury and due process.[84] The second question is concerned with whether aggregate assessment constitutes a change in the substantive law of the United States, and is therefore not permitted by the Rules Enabling Act.[85] The most prestigious judicial body to answer the latter question in the affirmative is the Court of Appeals for the Second Circuit, in its well known decision in *Eisen III*,[86] which is examined later in this chapter.[87]

Fortunately, there is no need for the Commission to become enmeshed in the more technical aspects of this debate, as the Rules Enabling Act is obviously inapplicable and there are no similar constitutional rights to trial by jury or due process in civil cases in Ontario.[88]

Unfortunately, the discussion of innovative class action procedures relating to monetary relief has been confused by the failure of the various commentators to agree upon the terminology to be applied to the various steps of the process. For the purposes of this Report, the term *aggregate assessment of monetary relief* will be used to refer to the determination, as a common question, of the total liability of the defendant to the class members,

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[82] See discussion, *infra*, this ch., sec. 3(c)(vi).

[83] See Simon, "Class Actions – Useful Tool or Engine of Destruction", 55 F.R.D. 375 (1972), at 377-86; American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure* (1972), at 17-18 (hereinafter referred to as "American College of Trial Lawyers"); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (hereinafter referred to as "*Eisen III*"); *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974); *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, *supra*, note 53; and *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977).

[84] See U.S. Const. amend. VII, and amends. V and XIV, respectively.

[85] The Rules Enabling Act, 28 U.S.C. §2072 (1976), forbids the promulgation of rules that "abridge, enlarge or modify any substantive right".

[86] *Eisen III*, *supra*, note 83. Class action proponents have replied with detailed rebuttals of the constitutional arguments, and have either argued that aggregate assessment of monetary relief and the various forms of distribution of the resulting fund are merely procedural, or else have advocated legislation to implement them as a matter of substantive policy. See, for example, Landers, *supra*, note 71, at 868-74; *In re Antibiotic Antitrust Actions*, *supra*, note 80, at 288-89; Newberg, *supra*, note 69, §4620, at 87-88; Schwing, *supra*, note 69, at 121-23; Managing the Large Class Action, *supra*, note 69, at 446-54; and Due Process and Fluid Class Recovery, *supra*, note 69, at 236-42.

[87] See *infra*, this ch., secs. 3(b)(i) and 3(c)(vi)b.

[88] While the *Canadian Charter of Rights and Freedoms* does provide that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice", it should be noted that this "due process" provision does not apply in the case of property: see s. 7 of the *Canadian Charter of Rights and Freedoms, Constitution Act, 1981*, Part I, appearing as Schedule B to the *Canada Act*, Proposed Constitutional Resolution, December 8, 1981.

without resort to individual trial proceedings. The stage of the distribution process of any aggregate assessment at which class members file individual claims against the fund resulting from an aggregate award will be referred to as *individual distributions*.[89] Other forms of distribution that have the effect of providing an indirect compensatory benefit to class members will be referred to as *cy-près distributions*. Forms of distribution that have no compensatory effect[90] will be identified as *deterrent* or *forfeit* distributions.

The terminological confusion in the United States reaches its height with regard to the use of the term "fluid recovery" (or "fluid class recovery"). This phrase has been used most frequently to refer to the entire procedure of aggregate calculation of damages, individual distribution, *cy-près* distribution, and deterrent distribution.[91] Some commentators, however, have defined the term to refer only to the various forms of indirect distribution of the residue of an aggregate award remaining after individual distribution.[92] In one text, the term is restricted further to refer only to compensatory distributions.[93] In order to avoid confusion, the term "fluid recovery" will be avoided in this Report. This position is reinforced by the fact that the policy issues associated with each of the different stages of the class action damage procedure described above differ substantially, rendering it desirable to distinguish clearly between them by using specifically assigned names.

(b) Propriety of Aggregate Assessment of Monetary Relief

The question for determination by the Commission is whether a provision expressly authorizing the assessment of monetary relief in common proceedings should be adopted as part of the proposed Ontario class action procedure. In formulating a recommendation on this point, consideration will be given not only to the American experience, where individualized treatment of monetary issues has tended to be viewed as the norm, but also to the Ontario class action jurisprudence, where common treatment of monetary issues has been more acceptable than individual assessment.

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[89] In addition to filing claims against the fund, there are other ways in which individual class members may receive their share of an aggregate award: see the discussion of direct and average distributions *infra*, this ch., sec. 3(c)(ii) and (iv), respectively.

[90] The word "compensatory" has been used in opposition to the word "deterrent", although not all forms of monetary relief are compensatory, in the sense that the harm done is the appropriate measure of relief. Nevertheless, it will be convenient to use the word "compensation" at times in this Report to refer to situations in which class members receive some direct or indirect benefit from an aggregate award.

[91] See, for example, Shlachter, *supra*, note 75; Note, "Notice, Mini-Hearings and Fluid Class Recovery: Some Reflections on Eisen v. Carlisle & Jacquelin and the Scope of Fed. R. Civ. P. 23" (1973), 59 Ia. L. Rev. 252, at 275-77 (hereinafter referred to as "Notice, Mini-Hearings and Fluid Class Recovery"); Schwing, *supra*, note 69, at 118; Due Process and Fluid Class Recovery, *supra*, note 69, at 227; Gordon, *supra*, note 72, at 724-25; and Malina, "Fluid Class Recovery as a Consumer Remedy in Antitrust Cases" (1972), 47 N.Y.U. L. Rev. 477, at 482.

[92] See, for example, Gould, *supra*, note 75, at 183 *et seq.*, and Harvard Developments, *supra*, note 70, at 1521-22.

[93] See Newberg, *supra*, note 69, §4620, at 85.

(i) The American Experience under Rule 23

Rule 23 of the United States Federal Rules of Civil Procedure is silent with respect to the propriety of aggregate assessment of monetary relief. The response of the American courts to aggregate assessment can be summarized as an initial rejection, influenced, perhaps, by the fact that the cases in which this procedure was first suggested were not particularly appealing class actions, followed by a more receptive approach in more recent years.

The case that is most commonly cited for the proposition that an aggregate assessment of damages is *per se* improper under Rule 23 is the decision of the Court of Appeals for the Second Circuit in *Eisen III*.[94] This was an antitrust class action in which the representative plaintiff sued two brokerage firms for conspiring to monopolize odd-lot trading and for fixing the odd-lot differential at an excessive amount. The *Eisen* case was not a very attractive class action, since it involved a class of 6,000,000 investors scattered throughout the United States and many foreign countries, whose claims, moreover, were so small that they were likely to be nonviable.[95] In fact, the Court calculated that the average class member would be entitled to trebled damages of only $3.90.[96]

Judge Tyler, the District Court judge responsible for the case, in an attempt to develop procedures for the assessment and distribution of damages,[97] concluded that the total amount of damages suffered by class members could be determined without having each member of the class file an individual claim. The damages could be assessed on the basis of the defendants' records, certain studies of the particular industry, and the fact that the defendants made the same charge to all buyers and sellers, regardless of the type of transaction.

The fact that the extent of the defendants' liability could be established as a common question was not sufficient to dispose of the issue whether the class action could be effectively administered, however. Because the claims of most of the class members were so small as to be nonviable, it was clear that some portion of the aggregate award would be left undistributed. Accordingly, it was necessary to determine whether some other disposition could be made of this residue. Tyler J. suggested that any portion remaining after individual distribution to class members with larger claims could be applied for the benefit of the class through an order that the odd-lot differential be reduced by the defendants until the residue was exhausted by the reduction. In this way, those class members who continued their odd-lot activity would reap the benefit of any recovery. In other words, Judge Tyler was prepared to

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[94] *Supra*, note 83. For a detailed discussion of this case, see *supra*, ch. 13, sec. 2(a)(i).

[95] *Ibid.*, at 1008-10.

[96] *Ibid.*, at 1010.

[97] Judge Tyler initially had refused to certify the action on the grounds, *inter alia*, of unmanageability: see *Eisen v. Carlisle & Jacquelin*, 41 F.R.D. 147 (S.D.N.Y. 1966). This decision was overturned by the Second Circuit Court of Appeals, and the case was remanded, so that Tyler J. could fashion appropriate procedures to deal with the distribution of the damages claimed by the class: see *Eisen II*, *supra*, note 52.

order what we have referred to as a form of *cy-près* distribution,[98] although he preferred to refer to this arrangement as a "fluid recovery".[99] All Judge Tyler's efforts came to naught, however, when the Second Circuit Court of Appeals overturned his decision and concluded that the class action was unmanageable.[100]

Because a *cy-près* order is not an essential concomitant of an aggregate assessment of monetary relief, a detailed examination of the *cy-près* aspect of Judge Tyler's decision, and the Second Circuit's criticism thereof, will be deferred to the section of this chapter dealing with *cy-près* forms of distribution. It is important to note this aspect of the case at this juncture, however, because a careful examination of the Second Circuit Court of Appeals' decision in *Eisen III*, combined with a perusal of subsequent decisions of that Court, strongly suggests that it was the *cy-près* scheme that the Court found alarming,[101] with the condemnation of aggregate assessment of damages being an incidental side effect thereof.[102]

The most interesting of the objections to aggregate assessment raised by the Court of Appeals for the Second Circuit was its suggestion that such a determination involved "some process of divination".[103] To the extent that this phrase accurately characterized the quality of the evidence supporting the proposed aggregate assessment in the particular case, such an assessment would obviously be improper. As will appear from the subsequent discussion, however, there are many cases in which damages can be proved in common proceedings by the same sort of evidence and with the same degree of accuracy as in individual proceedings. The mellowing of the American courts, including the Second Circuit,[104] in more recent years may well reflect a growing awareness of this fact, resulting from an exposure to a broader range of class action cases and fact situations. The question of the standard of accuracy that should be required in an aggregate assessment is considered in greater depth at a subsequent stage of this chapter.[105]

The *Eisen III* decision was appealed to the United States Supreme Court,

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[98] See *infra*, this ch., sec. 3(c)(v).

[99] See *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971), at 264.

[100] *Eisen III, supra*, note 83.

[101] Indeed, because of the Second Circuit's unfortunate tendency to use the words "fluid recovery" to describe the procedures to which it objects, without any attempt to define this extremely vague phrase, it is frequently difficult to ascertain whether the Court of Appeals for the Second Circuit is directing its comments to the aggregate assessment procedure, or only to the *cy-près* distribution scheme. It appears, however, that any objections of the Second Circuit to aggregate assessment, in particular, were founded on the proposition that this procedure involved a violation of the defendants' constitutional right to due process, as well as an improper alteration of substantive rights in violation of the Rules Enabling Act, *supra*, note 85.

[102] See discussion of the *Van Gemert v. Boeing Company* litigation, *infra*, this sec.

[103] *Eisen III, supra*, note 83, at 1013.

[104] See the discussion of the *Van Gemert v. Boeing Company* litigation, *infra*, this sec.

[105] See *infra*, this ch., sec. 3(b)(v) and (vi).

which rendered a decision commonly known as *Eisen IV*.[106] The Supreme Court proceeded to dispose of the case on other grounds, relating to the notice requirement, and expressly indicated that it had "no occasion to consider whether the Court of Appeals correctly resolved the issues of manageability and fluid class recovery, or indeed, whether those issues were properly before the Court of Appeals under the theory of retained jurisdiction".[107] The law in this area was therefore left in a state of considerable uncertainty.

The reasoning of the Second Circuit Court of Appeals in *Eisen III* was approved by the Court of Appeals for the Ninth Circuit in *In re Hotel Telephone Charges*,[108] and by the Fourth Circuit Court of Appeals in *Windham v. American Brands, Inc.*[109] It should be noted that the *Hotel Telephone* case, like *Eisen III*, involved very small claims asserted on behalf of a very large class,[110] while the claims of the class members in *Windham* were so individualized that no common proof would have been feasible, even if aggregate assessment were otherwise allowed.[111]

Despite *Eisen III* and similar decisions, a number of American courts have, in fact, displayed a receptive attitude to the use of common proof with respect to monetary claims, where insistence upon individualized testimony would provide unnecessary complications for the class members and the courts. One such class action is *Samuel v. University of Pittsburgh*.[112] In this case, the District Court judge had held unconstitutional a statewide residency rule applied by universities, which provided that, for the purpose of deciding whether a student was entitled to the tuition rate applicable to residents, the domicile of the wife was that of the husband. The judge decided that the members of the plaintiff class who had suffered injury by reason of the application of this rule were entitled to restitution, and then proceeded to decertify the class and leave each class member to press her claim individually.[113]

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[106] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (hereinafter referred to as "*Eisen IV*").

[107] *Ibid.*, at 172, *n.* 10.

[108] *Supra*, note 83, at 90.

[109] *Supra*, note 83, at 66.

[110] The facts of the *Hotel Telephone* case were even less attractive than those in *Eisen*, since the class was larger (forty million persons) and the claims were smaller ($2.00 per person, relating to an allegedly improper telephone surcharge imposed by the hotels): *supra*, note 83, at 88 and 91. Although the details are not set out in the case, it appears that the plaintiffs also contemplated the use of a *cy-près* distribution scheme: *ibid.*, at 89-90.

[111] *Windham* involved a claim by growers of flue-cured tobacco in South Carolina that tobacco companies and the Secretary of Agriculture had violated the antitrust laws. The tobacco in question was a non-standardized commodity with 161 different grades that had been sold in thousands of auction sales over four marketing seasons; moreover, a wide variety of substantive claims were being asserted: *supra*, note 83, at 62-64 and 66-67.

[112] 538 F.2d 991 (3d Cir. 1976).

[113] *Samuel v. University of Pittsburgh*, 375 F. Supp. 1119 (W.D. Penn. 1974), at 1136. It should be noted that this is a departure from the normal American approach to individual issues in class actions, which are usually administered with a measure of continuity under the supervision of the same judge.

The class plaintiffs appealed to the Court of Appeals for the Third Circuit, which reversed the trial judge on this point, on the ground that the university's records provided a basis for identifying the class members who were entitled to restitution and the amounts to which they were entitled.[114] Indeed, the amounts in question were so easily and reliably ascertainable that the Third Circuit directed the defendants to make the necessary calculations, and suggested that the class members be informed of the amounts to which they were entitled, instead of requiring that the class members inform the court of their entitlement.

Roper v. Consurve, Inc.[115] also provides an example of a case in which it was recognized expressly that the entitlement of class members to monetary relief could be proved most satisfactorily from the defendant's records, without the need for evidence from individual class members. The *Roper* case concerned a class action brought by credit cardholders against a national bank, alleging that charges made against their accounts were usurious under Mississippi law. The defendant managed the accounts of the class members by means of a computer, and retained computerized records from which the identity of the 90,000 class members and the amount of any overcharge could be determined without individualized proof. The Court of Appeals for the Fifth Circuit expressly relied on these facts in certifying the class action and emphasized that it would not be necessary to hear evidence on each claim.[116]

The *Roper* case, while it neither expressly mentions nor rejects the *Eisen III* decision, would seem at least implicitly inconsistent with it. If a defendant is entitled to have class members prove their claims through individual "mini-trials" as a matter of due process, it is difficult to see why the requirements of due process should vary because the requisite evidence and calculations can be provided by a computer. If, on the other hand, "mini-trials" are not required because of the persuasive nature of the evidence, why should common proof by other satisfactory evidence not be permitted in other situations as well?

The two preceding cases involved the Courts of Appeals for the Third and Fifth Circuits, respectively. It is also significant that the Court of Appeals for the Seventh Circuit, in two separate cases in which it had the opportunity to express an opinion on the merits of the *Eisen III* treatment of "fluid recovery", followed the example of the United States Supreme Court in *Eisen IV*, and expressly refrained from doing so.[117]

The most interesting recent decisions for our purpose, however, are those of the Second Circuit arising out of the *Van Gemert v. Boeing Company*

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[114] *Supra*, note 112, at 997 and 999.

[115] 578 F.2d 1106 (5th Cir. 1978).

[116] *Ibid.*, at 1112.

[117] See *Appleton Electric Co. v. Advance-United Expressways*, 494 F.2d 126 (7th Cir. 1974), at 137, *n.* 21, and *In re General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979), at 1136, *n.* 52.

litigation.[118] These decisions tend to suggest either that the Second Circuit's major objection in *Eisen III* was to the *cy-près* distribution scheme, rather than to the aggregate assessment of damages, or that the Second Circuit is having second thoughts about the subject of "collective" recoveries as more appealing cases come before it.

In *Van Gemert*, a class consisting of nonconverting holders of convertible subordinated debentures brought suit against the Boeing Company, claiming that the company had given insufficient notice of its intention to call the debentures and that, as a result, class members were unable to exercise their conversion rights prior to the deadline for the call. In its first decision in this action (*Van Gemert I*), the Second Circuit Court of Appeals ruled in favour of the class on this point, and remanded the case for a determination of damages.[119] The evidence heard upon the remand made it clear that the loss suffered by each class member was in excess of $200, a sum much more substantial than the $3.90 recoverable by the average class member in *Eisen*.[120]

The representative plaintiffs appealed the District Court judge's determination of the measure of damages and his refusal to award prejudgment interest (*Van Gemert II*). In the course of determining these issues, the Second Circuit Court of Appeals made the following observations:[121]

> On March 30, 1966, $1,544,300 in principal amount of unregistered debentures had not been converted. *Therefore the class as a whole suffered damages of $3,289,359, exclusive of pre-judgment interest.* This sum with interest represents the maximum amount to be distributed should all possible class members be identified and file proofs of claim.

The Court again remanded the case for "entry of a judgment in accordance with this opinion".[122] Subsequent proceedings in the District Court resulted in an order directing the deposit of the amount of the judgment award, which was approximately six million dollars when prejudgment interest was included, in a New York City bank. A Special Master was

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[118] *Van Gemert v. Boeing Company*, 520 F.2d 1373 (2d Cir. 1975) (hereinafter referred to as "*Van Gemert I*"); *Van Gemert v. Boeing Company*, 553 F.2d 812 (2d Cir. 1977) (hereinafter referred to as "*Van Gemert II*"); *Van Gemert v. Boeing Company*, 573 F.2d 733 (2d Cir. 1978) (hereinafter referred to as "*Van Gemert IIIA*"); and *Van Gemert v. Boeing Company*, 590 F.2d 433 (2d Cir. 1978) (hereinafter referred to "*Van Gemert IIIB*"), aff'd as *The Boeing Company v. Van Gemert*, 444 U.S. 472, 100 S. Ct. 745 (1980) (hereinafter referred to "*Van Gemert IV*") (subsequent references are to 100 S. Ct.).

[119] *Van Gemert I, supra*, note 118.

[120] The redemption price for each $100 of principal amount of debentures was $103.25. If the appellants had been able to meet the call deadline, they could have converted each $100 of principal amount of debentures into at least two shares of common stock. On the cut-off date for the exercise of the conversion privileges, the common stock obtainable for each $100 of debentures was worth $316.25. Within thirty days thereafter, the stock was worth $364. These figures are taken from *Van Gemert II, supra*, note 118, at 813.

[121] *Van Gemert II, supra*, note 118, at 815 (emphasis added).

[122] *Ibid.*, at 816.

appointed with authority to receive and pass upon proofs of claim and to supervise the administration of the judgment.[123] It may be noted that the making of such an order is precisely the procedure advocated by supporters of aggregate assessment of monetary relief where a common monetary judgment against the defendant has been rendered.[124]

The decision in *Van Gemert II* did not, however, dispose of the litigation. The defendant appealed again to the Court of Appeals for the Second Circuit on the question whether the portion of the escrow fund that was unclaimed following distribution to class members could be charged with a *pro rata* share of the attorneys' fees and expenses under the "common fund" exception to the American costs rule.[125] In two separate judgments rendered on this appeal,[126] the Court failed to object to the judgment in favour of the class for the aggregate amount. While it would appear that the defendant did not raise the propriety of the aggregate assessment on appeal, it would nevertheless have been open to the Court to suggest that this approach was improper under the decision in *Eisen III*. The fact that the Court did not object may be seen as suggesting that the condemnation of "fluid recovery" by the Second Circuit in *Eisen III* related not to the aggregate assessment of damages, but rather to the *cy-près* distribution scheme.

On a further appeal by the defendant to the United States Supreme Court on the "common fund" point, again no objection was made by the Court to the aggregate award; indeed, the Court referred to the class members as the "equitable owners" of their shares of the fund.[127] Moreover, the Court, as in *Eisen IV*, expressly refrained from passing any judgment on the propriety of "fluid class recovery".[128] While the significance of this decision is uncertain in light of the defendant's failure to appeal the aggregate award, the least that can be said is that the Supreme Court of the United States appears to have an open mind on the subject of aggregate assessment.

(ii) The Canadian Experience

Ironically, the aggregate assessment of monetary relief may be far more consistent with existing Ontario case law relating to the propriety of class actions for damages than individual assessment of damages, which American courts have accepted in those cases where there are no problems of manageability or predominance.

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[123] See *Van Gemert IIIA, supra*, note 118, at 734.

[124] See *supra*, this sec.

[125] Under this exception, United States federal courts have exercised an equitable power to allow attorneys' fees to be charged against a fund created, increased, or protected by successful litigation. See discussion *infra*, ch. 17, sec. 3(a)(i).

[126] *Van Gemert IIIA* and *Van Gemert IIIB, supra*, note 118.

[127] *Van Gemert IV, supra*, note 118, at 751. Rehnquist J. dissented on a procedural point.

[128] It is unlikely that the Court considered the aggregate award to be a "fluid class recovery", as it stated that no fluid class recovery was involved in the case: see *Van Gemert IV, supra*, note 118, at 750, *n.* 6.

The procedure approved by the Ontario Court of Appeal in the following passage from *Farnham v. Fingold*[129] is precisely that advocated by proponents of aggregate assessment of monetary relief:[130]

> [I]n the present case it is clear . . . that the only damages alleged by the plaintiff to have been sustained by the class he represents, including damage for conspiracy, is the gross premium above market price received by the controlling shareholders on the sale of their shares to Stanton Pipes Limited and that the individual entitlement of members of the class is simply to a *pro rata* share of such gross premium . . . . It will be for the trial Judge to determine whether such a claim for gross premium is properly one for damages at all . . . . *However, such gross premium can be fairly simply and readily established and without the evidence of the individual members of the class, whose separate entitlements will be established in proceedings subsequent to trial, to which the defendants need not be parties.*

Farnham v. Fingold arose out of an agreement for the sale of a company under which the controlling shareholders were paid a premium on their shares that was not offered to other shareholders. The plaintiff sued on behalf of the non-controlling shareholders to recover the premiums.

In *Farnham*, the Ontario Court of Appeal apparently contemplated that the amount of the "gross premium" received by the defendant would be established as a common question at trial, and that judgment would be given for this amount. The resulting aggregate award could then be distributed among the class members, presumably in proportion to the number of shares of stock they held. Since the amount of the defendant's liability to the class members could be established accurately in the common proceedings, the defendant would have no right to relitigate this issue by contesting the claims of individual class members, although, in order to protect the other members of the class, adequate proof of stock ownership would be required before a particular claimant would be allowed to recover.[131] The Ontario Court of Appeal gave no guidance, however, with respect to the disposition of any residue of the fund that might remain if all class members did not file claims. It should be noted that, although the underlying issues of fact and law are not identical, there is a certain similarity between the procedures contemplated by the Ontario Court of Appeal in *Farnham* and those utilized in *Van Gemert*.

In a subsequent case, *Northdown Drywall & Construction Ltd. v. Austin Co. Ltd.*,[132] the Divisional Court, on appeal from a decision of Galligan J., attempted to restrict somewhat the ambit of the *Farnham* case to situations where damages have been suffered by the class as a class. The case involved a claim by a subcontractor and the members of a union, asserted through a class action brought on their behalf, against a general contractor and representatives of another union for damages resulting from a conspiracy to injure. More specifically, the defendant general contractor refused to allow the plaintiff subcontractor to proceed with work under a contract between

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[129] *Supra*, note 40.

[130] *Ibid.*, at 136-37 (emphasis added).

[131] See the discussion of individual distributions of this sort, *infra*, this ch., sec. 3(c)(iii).

[132] (1975), 8 O.R. (2d) 691 (Div. Ct.).

them, because the subcontractor refused to hire members of the defendant union in violation of its collective agreement with the plaintiff union.

The defendants, predictably, had cited *Markt & Co., Ltd. v. Knight Steamship Co., Ltd.*[133] for the proposition that class actions for damages were not permitted. Galligan J. was prepared to allow the class action to proceed, notwithstanding the fact that damages were claimed, on the ground that all members of a union have the "same interest" in seeing to it that the economic activity of an employer with whom the union has a collective agreement is not interfered with unlawfully.[134] Galligan J. appeared to assume that a fair and accurate assessment of damages in common proceedings, similar to that suggested by the Court of Appeal in *Farnham*, was both feasible and proper on the facts of the case, and adopted, albeit without direct citation, the notion of damages to the class as a class, first originated by Ferguson J.A. in *Bowen v. MacMillan*[135] in 1921, as a basis for distinguishing *Markt*, with its emphasis upon the individual nature of damages.

The defendants appealed Galligan J.'s decision to the Divisional Court, which reversed it in part, and upheld it in part.[136] On the one hand, the Divisional Court adopted Galligan J.'s proposition that damages suffered "by the class as a class" could be recovered in a class action, notwithstanding the restrictive language of *Markt*, and was prepared to allow the class to recover damages for loss of salary check-offs payable to union funds on this ground.[137] On the other hand, it rejected the proposition that a class action for damages could proceed where "the damages claimed were the accumulation of the individual claims of members of Local 562 for lost wages, or for damages for loss of the opportunity to work".[138] It should be noted, however, that the Divisional Court was not, in fact, making a determination whether aggregate calculation of damages was acceptable in an otherwise proper class action, but rather was deciding whether the presence of individual claims for damages prevented the use of the class action procedure.[139]

Unfortunately, the Divisional Court articulated no criteria for determining when damages could be categorized as flowing "to the class as a class", instead of to the individual class members, although some guidance may be found in the fact that the particular damage claims that the Divisional Court approved would have involved payment to the union to which the class members belonged.[140] However, to the extent that damages were suffered by

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[133] *Supra*, note 2.

[134] (1974), 6 O.R. (2d) 223 (H.C.J.), at 225-27.

[135] *Supra*, note 36.

[136] *Supra*, note 132, at 693-94.

[137] *Ibid.*, at 694.

[138] *Ibid.*, at 693.

[139] There does, however, appear to have been an implicit difference of opinion between Galligan J., in the court below, and the Divisional Court as to the feasibility and fairness of a common damage determination.

[140] *Supra*, note 132, at 694.

the "class as a class", the Divisional Court appears to have approved the use of a common question approach to assessment of monetary relief.

The restrictions imposed by the Divisional Court in *Northdown* were rejected, at least implicitly, by the Ontario Court of Appeal in *Naken v. General Motors of Canada Ltd.*[141] That case clearly did involve claims of individual Firenza owners for damages. Indeed, the Ontario Court of Appeal expressly noted that the Divisional Court had refused to allow the action to proceed in class form on the basis, *inter alia*, that there was no common fund in which each member of the class had an interest, and that the action was not for damages to the class, as an entity distinct from its members, but rather was the accumulation of individual claims for losses personal to each purchaser. Nevertheless, the Ontario Court of Appeal allowed the *Naken* class action to proceed, and approved the plaintiffs' proposal that an identical amount of damages, allegedly suffered by each Firenza owner, could be proved as a common question, so that no individual assessment of damages would be required.[142]

It may be noted that, although the amount of damages suffered by each class member would be determined in common proceedings under the approach approved by the Court in *Naken*,[143] no judgment for an aggregate sum is mentioned. This reflects the fact that such an award is impossible in that case, because the number of members of the class who would be entitled to the damages could be ascertained only following individual proceedings designed to determine the question of reliance, which forms part of the cause of action. However, if there had been no individual issues with respect to reliance,[144] it would then have been necessary for the Ontario Court of Appeal to determine whether it would follow the example of *Farnham* and allow judgment to be given for this "gross" amount, despite the absence of even a fictional "common fund",[145] or whether it would require the class members to assert some form of individual proof.

(iii) Aggregate Assessment and Statutory Provisions

Much of the difficulty that American courts have experienced with the aggregate assessment of monetary relief may reflect the fact, mentioned

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[141] *Supra*, note 39.

[142] *Ibid.*, at 789-90.

[143] Under s. 11 of the proposed *Class Actions Act*, such an approach would be open to the court. Section 11 expressly authorizes the court to determine questions that are common to the class in common proceedings. Identical damages suffered by each member of the class clearly would give rise to a "common question".

[144] See Ontario Law Reform Commission, *Report on Sale of Goods*, Vol. III (1979), setting out "An Act to Revise The Sale of Goods Act", s. 5.10(1)(a), at 26, under which, in lieu of reliance on an express warranty, it would be sufficient to show that "the natural tendency of such representation or promise is to induce the buyer, or buyers generally if the representation or promise is made to the public, to rely thereon".

[145] It is most unlikely that the defendants in *Farnham* had in fact segregated their "gross premium" from their other funds, so there would not be, in that case, a common fund in any technical sense.

earlier, that Rule 23 is completely silent with respect to the propriety of aggregate assessment. More recent class action legislation and proposals have shown a distinct tendency to fill this gap by making express provision for the aggregate assessment of monetary relief.

For example, aggregate assessment provisions have been included in the Quebec class action legislation,[146] and in the American "*parens patriae*" legislation, which provides for the aggregate assessment of damages in price-fixing cases.[147] The American Uniform Class Actions Act[148] contains provisions that clearly imply the utilization of an aggregate assessment procedure. The Draft Bill for a Class Actions Act proposed by the Law Reform Committee of South Australia also contains a provision that would expressly authorize the utilization of an aggregate assessment procedure.[149]

Other class action proposals that would permit the aggregate assessment of monetary relief include the following: Bill H.R. 5103, proposed by the Office for Improvements in the Administration of Justice of the United States Department of Justice, which contained complex aggregate assessment provisions as part of its "public" mass remedy,[150] and Bill C-42,[151] the legislation proposed to replace the *Combines Investigation Act*.[152]

These provisions have the advantage of settling expressly the uncertainties concerning the propriety of determining the amount of monetary relief owing to class members as a common question. They also reflect the judgment of a number of legislators and law reformers that the aggregate assessment approach can contribute to the efficiency and effectiveness of class actions.[153]

(iv) Fairness of Aggregate Assessment of Monetary Relief

The policy argument that appears to underlie the opposition to the treatment of the assessment of monetary relief as a common question is that

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[146] *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, arts. 1031 and 1032, as enacted by S.Q. 1978, c. 8, s. 3 (hereinafter referred to as "C.C.P.").

[147] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, Title III, §301, 90 Stat. 1383, enacting 15 U.S.C. §15D (hereinafter referred to as "Antitrust Improvements Act").

[148] National Conference of Commissioners on Uniform State Laws, Uniform Class Actions Act, Uniform Laws Ann. (1975), Vol. 12 (Cum. Supp. 1981), at 20, §15(c)(5), (6), and (8) (hereinafter referred to as "U.C.A.A.").

[149] South Australia Draft Bill, *supra*, note 58, s. 10(1).

[150] Small Business Judicial Access Act of 1979, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill H.R. 5103, 96th Cong., 1st Sess. (1979), §3004 (hereinafter referred to as "O.I.A.J. Bill H.R. 5103").

[151] Bill C-42, *supra*, note 58, s. 39.15(1)(*a*).

[152] R.S.C. 1970, c. C-23, as amended.

[153] See, also, "Proposed Federal Consumer Class Action Legislation - II" (1975), 4 C.A.R. 342, §8(b), at 344-45.

such a procedure is unfair to defendants, and contrary to "traditional notions of equity and fairness".[154] The countervailing argument is that class actions arising out of mass wrongs are not "traditional" cases, and that therefore "traditional notions of equity and fairness" may no longer be apposite.[155]

In a traditional case, the dispute will place in opposition a single plaintiff and defendant or, at most, a very limited number of parties. The traditional case will ordinarily involve a claim for a relatively large, individually recoverable sum, since it is not economically feasible to bring an action for a lesser amount. In such a situation, individualized proof of a right to monetary relief is the only possible procedure, and requiring such proof does not necessarily reflect a considered judicial decision that individual proof is the only fair approach in all circumstances.[156]

In individual cases, there is no particular unfairness in placing primary responsibility for proof of a monetary claim upon the claimant since, if the case reaches the stage where an assessment must be made, he or she will already be clearly identified and probably will have legal representation. Moreover, in many traditional lawsuits, the injury will be of such a nature that the victim is in the best position to present evidence concerning it, as in the case of a serious personal injury resulting from an automobile accident, or a loss of business profits resulting from a breach of an isolated, individual contract.

By contrast, in the case of mass wrongs, large numbers of individuals are likely to have been injured by patterns of similar, repetitive conduct. Such cases may place heavy burdens on the courts because of the large number of potential parties, while offering a countervailing possibility of economies of scale through the utilization of common evidence that would, by definition, not be available in the case of an individual wrong.

In deciding whether present procedures for the assessment of monetary relief should be adapted to take account of the unique features of class actions and mass wrongs, the proper approach, in our view, is not merely to consider whether a particular suggestion is a departure from past practice; instead, the question should be whether the proposed procedure strikes an appropriate balance between the risk of imposing liability upon defendants for an amount

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[154] See, for example, American College of Trial Lawyers, *supra*, note 83, at III.

[155] See, for example, Schwing, *supra*, note 69, at 116-18, and Manageability of Notice and Damage Calculation, *supra*, note 69, at 372.

[156] The need for departures from "traditional" procedures if "non-traditional" suits are to be processed with both fairness and efficiency, for both parties and the courts, is not restricted to class actions. In the United States, the number of lawsuits that do not fit comfortably within the old approaches to handling cases has been sufficiently large to justify the preparation, under judicial auspices, of a separate *Manual for Complex Litigation, supra*, note 68, to guide judges in devising procedures appropriate in solving new problems as they arise. The Manual applies not only to class actions but also to disputes that are so complex that they give rise to serious management problems, even though the number of parties is limited. Unlike the situation in class actions, the courts do not have the option of refusing to try such cases because they are unmanageable, with the result that the development of innovative procedures has been imperative.

that exceeds the injury actually inflicted, and the possibility of denying recovery to persons who have been injured.[157] The answer to this question depends not so much upon whether proof of the defendant's liability is offered in common or individualized form, as upon the reliability of the particular evidence that is submitted to the court.

Advocates of aggregate assessment of monetary relief agree that defendants should not be subject to an aggregate award in the absence of reliable evidence to support it. They would argue, however, that in many class actions the calculation of monetary relief on an aggregate basis will measure the harm done by the defendant as accurately as, or even more accurately than, individualized means of proof.[158] This might be the case, for example, where the defendant's records are more complete than those of the class members.

Proponents of aggregate assessment suggest that the defendant is sufficiently protected if there is an adequate opportunity to contest the merits and amount of an aggregate award of damages.[159] Commentators agree that the defendant should have the opportunity to argue that questions of damages are so individualized that a "gross" award cannot be calculated,[160] or that the specific evidence introduced is too inadequate to be relied upon.[161] If, however, on the facts of the particular case, the court finds neither of these arguments persuasive, and concludes that the total liability of the defendant can be established by satisfactory evidence in common proceedings, it is argued that this is no more unfair to the defendant than the class treatment of other elements of liability.

The fundamental question that must be answered concerns the reliability of aggregate assessment as a means of determining the defendant's monetary liability. Is reliable common evidence ever available that might permit a fair determination of the amounts owed by the defendant without individual evidence from the class members? If not, then, aggregate assessment would obviously be improper in all cases. If such common evidence is available in at least some cases, it would appear useful, as a means of reducing the burdens that mass litigation places upon courts and parties, to permit aggregate assessment of monetary relief. The key issue is the type of evidence that should be required before a court makes an aggregate assessment. It is to this issue that we now turn our attention.

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[157] See Wright and Miller, *supra*, note 72, §1784, at 122-23 and 124-27.

[158] See, for example, Landers, *supra*, note 71, at 868.

[159] See, for example, Newberg, *supra*, note 69, §4620, at 88; Homburger, "Private Suits in the Public Interest in the United States of America" (1974), 23 Buffalo L. Rev. 343, at 372; and *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir. 1952), at 980-81.

[160] For an example of a supporter of aggregate recovery who recognizes that it will not always be appropriate, see Manageability of Notice and Damage Calculation, *supra*, note 69, at 364 and 373.

[161] See, for example, Managing the Large Class Action, *supra*, note 69, at 453-54. An example of an Ontario situation where an aggregate assessment of damages would clearly be impossible even in a class action would be the Mississauga train derailment and chlorine spill, where particular businesses and residents have suffered highly variable amounts of economic or other loss, depending upon their individual situation: see discussion *supra*, ch. 3, sec. 2(a).

(v) Evidentiary Standard for Aggregate Assessment of Monetary Relief

From the preceding discussion of the merits and fairness of aggregate assessment of monetary relief, it would appear that the Ontario Court of Appeal and some American courts have accepted the fact that, in at least some cases, a defendant's total liability can be established by satisfactory common evidence. The question to which we now must turn our attention is the standard by which the adequacy of the evidence designed to establish an aggregate entitlement to monetary relief should be evaluated.

a. Exact Assessment of Aggregate Monetary Relief from Defendant's Records

The American case law suggests that there are circumstances where the identity of class members can be ascertained and where monetary relief can be calculated from the defendant's own records with such mathematical precision that an aggregate assessment will yield a more exact measure of the harm done by the defendant than any system of individual proof. Indeed, in such a case, it may be feasible for the court simply to order the defendant to calculate the amount of the individual entitlements and to distribute them directly to the class members, with the court and counsel playing a merely supervisory role.

For example, in *Partain v. First National Bank of Montgomery*,[162] it was held that the defendant had compounded interest on credit extended through the Bank-Americard system in a manner that violated state and federal law. The presiding judge noted that the names and addresses of the class members, and the amounts to which they were entitled, could be identified from the bank's computerized records, and suggested that, once damages were thus determined, cheques could be mailed by the bank directly to class members.[163]

This approach seems reasonable. Indeed, it is far more likely in such a case that the defendant will have the information necessary to establish the damages suffered than the class members, who may not have kept their charge statements. Moreover, some of the members of the class may not possess the requisite expertise to do the complex interest calculations necessary to determine the amount to which they are entitled. Together with the economic, social, and psychological impediments to litigation, discussed elsewhere, these factors might well cause the total amount of damages proved in separate proceedings by individual class members to be substantially less than the amounts that the defendant's records would clearly indicate to be owing to members of the class. It will be recalled that, in a similar fact situation, the Court of Appeals for the Fifth Circuit, in *Roper v. Consurve,*

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[162] 59 F.R.D. 56 (M.D. Ala. 1973).

[163] *Ibid.*, at 59-62. See, also, *Eovaldi v. First National Bank of Chicago*, 71 F.R.D. 334 (N.D. Ill. 1976), at 337-38. For another case taking a similar position on comparable facts, see *Landau v. Chase Manhattan Bank*, 367 F. Supp. 992 (S.D.N.Y. 1973).

Inc.,[164] also approved the proposition that the defendant's liability for damages could be established without hearing evidence on each individual claim. The Fifth Circuit Court of Appeals specifically cited *Partain* in support of its decision.[165]

An example of a Canadian case in which the Court authorized an aggregate assessment and direct distribution by the defendant of the relief to which the class members were found to be entitled is *Chastain v. British Columbia Hydro and Power Authority*.[166] The Court in that case specifically ordered the defendant to return the security deposits improperly extracted by crediting the amounts in question to the class members' next bills.[167] This distribution was presumably based on records of security deposits maintained by the defendant.

Another case of interest in this respect is the Ontario case of *Shabinsky v. Horwitz*.[168] In that case, the plaintiff sued on behalf of himself and a group of catering employees of a hotel, claiming a declaration that the hotel held a gratuity fund in trust for the employees. Fraser J. expressly noted that the defendant's books showed what went into the gratuity fund claimed by the class of catering employees and gave judgment for the class that the defendant held this amount in trust. It was necessary to refer to the master only issues relating to the distribution of the fund to particular employees.

Of course, the mere fact that the defendant has records relating to the class members should not justify an award of aggregate monetary relief if there are individual issues that the records in question cannot resolve. In cases where such individual issues are not present, however, it is difficult to see what unfairness could possibly arise from allowing the replacement of individual "mini-trials" by assessment of monetary relief based upon satisfactory records of the defendant, such as those that existed in *Partain* and *Roper*.[169]

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[164] *Supra*, note 115, at 1108-10, 1112, and 1115.

[165] *Ibid.*, at 1112-13, *n.* 5. See, also, *Samuel v. University of Pittsburgh, supra*, note 112 and accompanying text. The Court of Appeals for the Third Circuit directed the defendant university to calculate the amounts of restitution to which the class members were entitled, and required the clerk of the Court to notify the class members of the "outcome of their particular claims", although the Court did not go so far as to order the direct distribution of cheques.

[166] *Supra*, note 44. For a discussion of this case, see *supra*, ch. 2, sec. 2(c)(ii)b.

[167] Order dated December 28, 1972, supplied to the Commission by counsel for the representative plaintiff.

[168] [1973] 1 O.R. 745, (1971), 32 D.L.R. (3d) 318 (H.C.J.).

[169] There may remain a few instances where, because the total amount at stake is small and the defendant's business is not computerized, the cost of ascertaining the amount owing will exceed the value of the total amount of monetary relief due, even where individual proof by class members is unnecessary. In such a situation, it would be reasonable to find that the costs of the class action outweigh its benefits under the "cost-benefit" provision that has been recommended *supra*, ch. 9, sec. 3(c), even if aggregate assessment of monetary relief were possible. Such situations should become increasingly rare, however, as the use of computers, including computerized preparation of salary and other cheques, spreads throughout the business world.

b. Reasonable Approximation of Individual and Aggregate Monetary Relief

Not all mass wrongs are of a kind, however, that involve defendant's records permitting the identification of class members or the precise determination of the amounts of monetary relief owing to each class member. But the mere fact that such proof is not available should not, in and of itself, be sufficient to preclude the use of aggregate assessment where other forms of persuasive evidence are available.

Perhaps the best example of a case where proof from the defendant's records may not be feasible, but where an aggregate award may nevertheless be justified, is where the measure of damages is determined by reference to the value of a particular kind of property. For example, it may be possible to arrive at a precise measure of value where there is a well-established market for the goods that records prices on a day-to-day basis. In such a situation, there can be little question that an aggregate assessment would yield as accurate a measure of the defendant's total liability as that produced by individual evidence, since the market value for identical goods would presumably be the same in all cases. Indeed, the calculation of the total amount of the defendant's liability to the class members may be as exact as where there is reliance on the defendant's records. This may well be the case even though there may be no precise way of ascertaining from such evidence the identity of class members in common proceedings, or the exact portion of the aggregate award that should be allocated to each class member. An example of such a case is *Van Gemert II*,[170] described above, where the Court of Appeals for the Second Circuit was able to calculate precisely the aggregate losses suffered by all members of the class by comparing the redemption price of each debenture with the market value of the common stock into which it could have been converted, and multiplying by the number of debentures.

Value determinations, however, will not always be so simple, especially if there is no existing market to provide a measure of value.[171] For example, in a class action claiming damages based upon the deficient value of an allegedly defective product,[172] it might well be possible to establish the actual present market value of the defective product by reference to the existing market for that product. However, in order to establish the amount of the deficiency, this value would then have to be compared with a hypothetical market value for the product that would have existed had the product not been defective. This would probably require some sort of expert testimony, and would inevitably involve the degree of uncertainty associated with all hypothetical assumptions. This uncertainty, however, would be no greater with respect to the determination of such a value in class proceedings than in a series of

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[170] *Supra*, note 118. For a discussion of this case, see *supra*, this ch., sec. 3(b)(i).

[171] See, for example, *Chaplin v. Hicks*, [1911] 2 K.B. 786, at 792, [1911-13] All E.R. 224 (C.A.).

[172] This may well be the case in *Naken v. General Motors of Canada Ltd.*, *supra*, note 39, in which the $1,000 damages claimed on behalf of each class member represents the difference in value between an allegedly defective Firenza and what each automobile would have been worth had it not, as contended by the plaintiffs, failed to comply with the express warranty.

individual actions brought by individual purchasers. Moreover, the common treatment of the question would at least prevent the possibility that different courts would independently come to inconsistent conclusions as to the hypothetical resale value.

Cases where the measure of damages involves an inherent degree of uncertainty, irrespective of whether the proceedings are class or individual in form, are not restricted to situations where monetary relief depends upon a "value" measurement. Similar problems may arise where monetary relief is assessed in other contexts, such as, for example, in civil rights and labour cases.

American courts dealing with civil rights claims have had to grapple with the problems involved in fashioning monetary relief where it is determined that an employer has discriminated on the basis of race or sex, and that the persons thus denied employment or promotion are entitled to compensation.[173] In such cases, the court must endeavour to determine how many positions would have been held by members of the group suffering discrimination if there had been no discrimination or unfair labour practices, and what the earnings of those persons would have been. That there is an inherent measure of uncertainty in such hypothetical determinations is patent. Yet, the only alternative to making such findings in the face of the uncertainty is to deny relief to victims of a defendant's wrongful conduct, and the courts have not hesitated to do their best to provide relief in such cases. Again, these problems are common to both individual and class actions.[174]

Ontario courts might well face similar problems in the civil rights[175] and employment contexts. For example, had the Court in the *Northdown Drywall* case, discussed above, been willing to permit the action to proceed with respect to the claim for lost wages, it would have been necessary for the Court to make a determination of the number of union members who would have been employed on the particular project, and their rates of earnings, in order to calculate the amounts to which the class would have been entitled.[176]

In light of these problems, it is necessary to determine whether aggregate awards of monetary relief, if allowed at all in class actions, should be restricted to cases where absolute precision is possible, or whether they should also be permitted in cases where a certain measure of uncertainty is associated with the ultimate award. In many cases, the very nature of the measure of damages specified by the substantive law may make absolute

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[173] See *infra*, this ch., sec. 3(c)(iv).

[174] Indeed, as will be seen *infra*, this ch., sec. 3(c)(iv), it is frequently easier to determine, as a common question, the number of positions that members of the group would have held, and the "back pay" associated with such positions, than it is to determine to which persons the resulting awards should be allocated from within an equally qualified group of candidates.

[175] See *supra*, ch. 5, sec. 3(a)(ii), for a discussion of the substantive causes of action in the civil rights area.

[176] These problems will be discussed further in the context of the *Northdown* case, *infra*, this ch., sec. 3(c)(iv).

precision impossible in individual suits and in class actions alike. In many cases, the degree of this imprecision may be no greater in the case of common proof in a class action than if individual evidence were produced in either a class or individual suit. And, as indicated above, aggregate assessment may have the potential to prevent inconsistent findings that might result from such uncertainty, if such damage issues were to be resolved in separate proceedings. In the view of the Commission, it seems reasonable that the propriety of aggregate awards should be determined by the same standards by which the propriety of an individual award of damages is decided.

A review of the case law reveals that plaintiffs in individual suits have never been held to a standard of absolute precision with respect to proof of damages in fact situations where the nature of the the defendant's misconduct renders such precision impossible. The Supreme Court of Canada, in the case of *Penvidic Contracting Co. Ltd. v. International Nickel Co. of Canada Ltd.,*[177] considered the question of the degree of uncertainty that is permissible in damage determinations, and reaffirmed the following proposition set out in its earlier decision in *Wood v. Grand Valley Railway Company:*[178]

> It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot 'relieve the wrongdoer of the necessity of paying damages for his breach of contract' and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do 'the best it can' and its conclusion will not be set aside even *if the amount of the verdict is a matter of guess work.*

The "guess work" language of the Supreme Court of Canada should be compared with the standard approved by the United States Supreme Court in *Story Parchment Co. v. Paterson Parchment Paper Co.,*[179] where the Court stated as follows:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while *the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.* The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.

The Commission believes that the standard articulated by the United States Supreme Court is an appropriate one.

(vi) Conclusion and Recommendations

The Commission is satisfied that, in some cases, aggregate assessment of

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[177] [1976] 1 S.C.R. 267, at 279-80.

[178] (1915), 51 S.C.R. 283, at 289, 22 D.L.R. 614 (emphasis in original).

[179] 282 U.S. 555 (1931), at 563 (emphasis added).

monetary relief can lead to greater justice for class members and improved efficiency for courts, without unfairness to defendants. In our view, there is no difference in principle between the utilization of common evidence to establish non-monetary elements of a cause of action against a defendant in a class action and the use of similar evidence to establish the amount of the defendant's monetary liability to class members. In both cases, the essential question is not whether evidence is put forward in common or individual form, but rather whether the proof submitted is sufficiently reliable to permit a just determination of the defendant's liability.

The Commission has concluded that the proposed Ontario *Class Actions Act* should authorize expressly the use of aggregate assessments and should specify the standard of proof that should be required before an aggregate award may be made. This would eliminate the possibility of extended litigation concerning the propriety of aggregate assessment of monetary relief and the requisite standard of proof.

Accordingly, the Commission recommends that, where monetary relief is claimed on behalf of the members of a class, no questions of fact or law other than the assessment of monetary relief remain to be determined in order to establish the defendant's liability to some or all class members, and the total amount of the defendant's liability, or part thereof, to some or all of the members of the class can be assessed without proof by individual class members with the same degree of accuracy as in an ordinary action, the court should determine the aggregate amount of the defendant's liability and give judgment for that amount.[180]

With respect to the standard of proof that should be required in making an aggregate assessment, it should be noted that we have recommended that, in the words of the Supreme Court of Canada, "mathematical accuracy"[181] should not be required. Instead, it should be sufficient if the defendant's liability can be assessed with the same degree of accuracy as in an individual action of the same kind.[182] The Commission does not believe that the flexibility that the courts have displayed in determining monetary awards in individual cases, where tolerance of a measure of uncertainty is essential if relief is to be provided to plaintiffs who have been injured, should be constrained to any greater extent merely because the measure of damages is to be established by common proof in a class action.

Under our recommendation, the defendant would be able to argue that the facts of the case are so individualized that individual proof of monetary relief by class members is essential. The defendant also would remain free to challenge the accuracy of the common proof submitted by the plaintiff through cross-examination or the introduction of contradictory evidence, or

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[180] See Draft Bill, s. 22.

[181] *Wood v. Grand Valley Railway Company*, *supra*, note 178, at 289, cited with approval in *Penvidic Contracting Co. Ltd. v. International Nickel Co. of Canada Ltd.*, *supra*, note 177, at 279-80.

[182] See Draft Bill, s. 22(*c*).

to argue that the margin of error inherent in particular common evidence is too great for reliance upon it to be fair to the defendant. If the prerequisites for aggregate assessment are met, however, an aggregate award should be mandatory. There would seem to be no justification for creating the manageability problems caused by "mini-trials" where liability can be established with the requisite degree of accuracy in more efficient proceedings.

The Commission's recommendation speaks in terms of "monetary relief", rather than "damages", in order to make it clear that aggregate assessment is also possible with respect to restitutionary and other monetary causes of action. The present "categorical" approach to the availability of monetary relief in Ontario ought not to be replaced by a categorical approach to aggregate assessment. The standard proposed by the Commission would permit the propriety of an aggregate assessment to be determined on a functional, case-by-case basis, irrespective of the kind of monetary relief that is being sought.

The above recommendation also reflects our view that the availability of aggregate assessment should not be restricted to situations where common proof is available with respect to the claims of all class members. In some cases, such evidence may be available only with respect to part of the class. Aggregate assessment in favour of some members of a class should be possible where the nature of their claims permits this, even though the presence of individualized issues prevents similar treatment of other members' claims.[183] Finally, it should be noted that the Commission's recommendation would also permit a partial aggregate assessment of some of the monetary relief to which class members are entitled, even though all issues relating to the defendant's potential liability cannot be established due to excessive uncertainty or variations in the individual fact situations of class members that relate only to part of their claims to monetary relief.[184]

(vii) Admissibility of Computer Evidence and Aggregate Assessment of Monetary Relief

It will be apparent from the preceding analysis that the Commission believes that aggregate assessment of monetary relief is of value both to courts and to parties because of its potential to avoid the need for repetitious and redundant individual evidence. As indicated, one of the circumstances in which reliable evidence is likely to be available to support an aggregate award is when the defendant maintains computerized records from which the identity of the class members and the amounts to which they are entitled can be determined. The *Roper* and *Partain* cases, which were discussed earlier in this chapter,[185] provide examples of cases where such a computer-based aggregate award would be feasible.

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[183] *Ibid.*, s. 22(*b*).

[184] *Ibid.*, s. 22(*c*). This may be possible, for example, in the case of a class action concerning a defective product. While an aggregate assessment may be possible with respect to the deficiency in the value of the product, individual proceedings probably would be necessary to assess the damages suffered as a result of any personal injury arising from the use of the product.

[185] See *supra*, this ch., secs. 3(b)(i) and 3(b)(v)a.

There is one problem associated with computerized evidence, however, that might serve as a barrier to the use of such evidence for the purpose of making an aggregate assessment. Computer records, like most other business records, constitute "hearsay" evidence, and therefore would be inadmissable. At first glance, the definition of "record" in section 35(l)(*b*) of the Ontario *Evidence Act*,[186] which includes "any information that is recorded or stored by means of any device", would seem broad enough to comprehend information stored in a computer "device" within the business records exception of section 35(2). It could be argued, however, that a computer print-out, as distinct from the data stored in the computer, would not be admissible; such a print-out normally would not be prepared in the "usual and ordinary course of business . . . at the time of such act, transaction, occurrence or event or within a reasonable time thereafter".[187] Rather, it would be prepared at some later time, and therefore it could be contended that it is not admissible.[188]

The Commission, in its 1976 *Report on the Law of Evidence*, recognized this problem, and formulated the following recommendation designed to deal with it:[189]

> The use of computerized records in the business community and in government is so widespread that it can be assumed that there is no greater margin of error in such records than in the case of ordinary commercial records, most of which have been admissible for many years under both the federal and provincial evidence acts.
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> . . . .
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> We recommend that *The Evidence Act* (Ontario) be amended to add the following subsection to the proposed draft section dealing with business records:
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> (13) Where a record containing information in respect of a matter is made by the use of a computer or similar device, the output thereof in a form which may be understood is admissible in evidence if the record would be admissible under this section if made by other means. [Draft Act, section 39(13).]

Although the law with respect to the admissibility of computer printouts

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[186] R.S.O. 1980, c. 145.

[187] *Ibid.*, s. 35(2).

[188] For a general discussion of the evidentiary problems associated with computerized information, see, for example, the Manual, *supra*, note 68, §§2.70, 2.714-2.717, and 3.50, at 140-41, 151-67, and 187-88; Younger, "Computer Printouts in Evidence: Ten Objections and How to Overcome Them" (1975), 2 Litigation (No. 1) 28; Jacobson, "The Use of Computer Printouts as Evidence in Commercial Litigation" (1977), 82 Com. L. J. (No. 1) 14; Note, "Evidence – The Admissibility of Computer Print-outs of Business Records" (1970), 41 Miss. L.J. 604; Tapper, "Evidence from Computers" (1974), 4 Rutgers J. Computers Law 324; Note, "Evidence – Admissibility of Computer Print-outs" (1974), 52 N.C. L. Rev. 903; Ewald, "Discovery and the Computer" (1975), 1 Litigation (No. 2) 27; Law Reform Commission of Canada, *Report on Evidence* (1975); and New South Wales Law Reform Commission, *Report on Evidence (Business Records)* (1973).

[189] Ontario Law Reform Commission, *Report on the Law of Evidence* (1976), at 188-92 and 263.

is still evolving,[190] considerable uncertainty remains in this area. In view of the considerable increase in the efficiency with which monetary and other issues could be resolved in class actions through the use of computer evidence, the Commission wishes to take this opportunity to reaffirm its earlier recommendation that the Ontario *Evidence Act* should be amended to permit the use of such evidence expressly.

(c) Distribution of Aggregate Awards

The preceding analysis has dealt with the general propriety of aggregate assessments of monetary relief, and with the formulation of recommendations concerning suitable standards for determining when aggregate awards would be proper under the proposed *Class Actions Act*. In this section, we shall examine the range of procedures that may be appropriate for the distribution of an aggregate award after judgment has been given against the defendant.

At the outset, it would seem desirable to describe briefly the assumptions that have influenced the Commission's recommendations relating to the distribution of an aggregate award to or for the benefit of class members.

First, we are of the view that, once the defendant's liability to the class members has been fully adjudicated in common proceedings, and the amount of the resulting aggregate award determined, the class members should be treated as being, in essence, the owners of the fund thus created.[191] Accordingly, when a conflict arises between the interests of the class members and those of the defendant with respect to the administration and distribution of the fund, the interests of the class members should be given priority. Such an approach is justifiable because the defendant will have had a full opportunity to litigate the fact and extent of his liability to class members in adversarial common proceedings. The defendant's aggregate liability cannot be further increased by the distribution proceedings.[192]

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[190] See, for example, *R. v. McMullen* (1979), 25 O.R. (2d) 302, at 306-09, 100 D.L.R. (3d) 671 (C.A.), and *R. v. Bell* (1982), 35 O.R. (2d) 164 (C.A.).

[191] This position is analogous to the position taken by the United States Supreme Court that the class members were at least the "equitable owners" of the aggregate award in *Van Gemert IV, supra*, note 118, at 751.

[192] A judgment determining that a class is entitled to an aggregate award would be finally binding on both the defendant and the class members, and not subject to further dispute on the basis of the outcome of the distribution proceedings. Thus, the defendant would not be permitted to impeach the aggregate award merely because all of it has not been claimed by class members. Such a result is justifiable not only under ordinary principles of *res judicata*, but because a failure by class members to assert claims may well reflect notice problems, or the operation of economic, social, or psychological barriers. Similarly, if, in very unusual circumstances, class members successfully asserted claims that exceeded the value of the aggregate award, they would not be permitted to challenge the original monetary judgment in favour of the class. If an aggregate award is not appealed, the defendant should be permitted to rely upon the court's judgment in planning his affairs, and be free of further financial uncertainty. In such a situation, the class members would be obliged to share on a *pro rata* basis whatever funds are available. This is the procedure that has been adopted by American courts in administering settlement funds that are less than the amount that the class might be expected to recover if successful in the litigation.

Secondly, the primary objective of the court in distributing the aggregate award should be to provide compensation in the form of monetary relief to as many class members entitled thereto as possible. The appropriateness of any particular distribution scheme should be evaluated in terms of whether it is in the class members' interests; the impact of the scheme on any residue[193] of the aggregate award that the defendant may be entitled to receive after all appropriate "compensatory" distributions have been completed should be irrelevant.

Thirdly, inaccuracies in distribution that are incidental to achieving a measure of redress for class members who would not otherwise receive monetary relief may be acceptable if the inaccuracies are not unreasonably great. The court's primary concern with respect to inaccuracies should be the protection of class members against the depletion of their aggregate award by unfounded claims. The primary role in protecting the interests of class members in this area should be played by the class representative and his lawyer, who may be expected to strike an appropriate balance between encouraging the adoption of procedures designed to maximize the number of class members who achieve recovery, and the utilization of appropriate safeguards against unjustified claims. The interest of the defendant, by contrast, is likely to be directed toward minimizing the number of class members who achieve recovery, in order to maximize any residue that might be available for return to him. At least until the defendant's claim for the return of any residue is directly in issue, any role played by the defendant in the distribution process should be non-adversarial.

As suggested above, it is possible that, following distributions designed to compensate class members, there nevertheless may remain an unclaimed residue of the aggregate award. It is at this stage, when all possible forms of "compensatory" distributions to class members have been completed, that a determination of the appropriate role for behaviour modification in class actions becomes most critical. This raises the question whether any residue of an aggregate award should be returned to the defendant in all cases where full distribution to class members is impossible, or whether the residue should be forfeited to the Province, at least in some cases, where such a result might encourage modification of inappropriate behaviour by the particular defendant or others similarly situated. The arguments relevant to this issue are complex, and will be deferred until a later stage of this chapter.[194]

(i) Payment of the Aggregate Award

The Commission is of the view that the presiding judge should exercise continuing supervision over the payment and administration of any monetary award in a class action, whether the award in question results from an

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[193] If all class members entitled to relief do not come forward to claim their shares of an aggregate award, there will be a residue. The distribution procedures in respect of such a residue are discussed *infra*, this ch., sec. 3(c)(vi).

[194] See *infra*, this ch., sec. 3(c)(vi).

aggregate or an individual assessment.[195] Accordingly, in the context of an aggregate assessment, the Commission believes that it is desirable that the proposed Ontario *Class Actions Act* should specify procedures designed to ensure appropriate judicial control over the distribution to class members of the amount awarded.

The Commission has concluded that, as a general rule,[196] the court should order that an aggregate award be paid into court. This would facilitate supervision by the court of the distribution of the fund, and would provide the financial resources necessary to defray the costs of an effective distribution programme.[197] It would have the further advantage of enabling the class to benefit from the interest earned by the fund prior to distribution.[198] In exceptional cases, however, the court may wish to arrange to have the fund administered by some non-judicial body, such as a trust company. Therefore, we recommend that, where monetary relief is assessed in the aggregate and direct distribution by the defendant[199] is not ordered, the court should order the defendant to pay into court or some other depository the total amount of the aggregate award.[200]

(ii) Direct Distribution to Class Members

The first step for any court concerned with the distribution of an aggregate award of monetary relief should be to determine whether distribution to some or all of the members of the class can be made directly without the filing of claims by such members. This type of distribution will minimize the cost to absent class members of asserting their claims and will ensure that few or no claims will be rendered nonviable by such costs.

For such a distribution to be possible, the class members must be readily identifiable, and information should be available that would permit the amount owing to each such class member to be particularized. This situation will arise most frequently where the identity of, and the amounts owing to, some or all of the class members can be determined from the defendant's

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[195] Later in this chapter, the Commission will recommend provisions designed to govern the payment of monetary relief owing as a result of an aggregate assessment or individual assessments, and to permit the court to allow payment by instalments or to stay execution of a judgment: see *infra*, this ch., sec. 5.

[196] This would not be necessary where the court orders a direct distribution by the defendant: see *infra*, this ch., sec. 3(c)(ii)a.

[197] See, for example, Gordon, *supra*, note 72, at 725, and "Federal Consumer Class Action Legislation" (1975), 4 C.A R. 3, at 21-22.

[198] In some cases, the interest may be sufficient to defray the distribution costs; the total administrative costs of "Operation Money Back" in the distribution of the settlement fund in the antibiotics litigation were less than the interest on the settlement fund: see Bartsh, Boddy, King, and Thompson, *A Class-Action Suit That Worked: The Consumer Refund in the Antibiotic Antitrust Litigation* (1978), at 33 (hereinafter referred to as "Antibiotics Study").

[199] See *infra*, this ch., sec. 3(c)(ii)a.

[200] See Draft Bill, s. 23(2).

records. In such a case, either the defendant might be ordered to distribute the monetary relief directly to the class members, or the court might undertake such a distribution where it does not believe that a distribution by the defendant would be appropriate. We deal with each of these possibilities in turn.

a. Direct Distribution by the Defendant

Where the court is of the view that a direct distribution by the defendant[201] would be the most effective means of compensating class members, it may wish to order that, instead of paying the aggregate award into court, the defendant distribute it directly to the class. A Canadian example of a direct distribution may be found in a Quebec class action, *Plouffe -c.- Cablevision Nationale Ltée.*[202] In that case, it was possible to determine from the records of the defendant the identities of, and the amounts owing to, a class of cablevision subscribers for service interruptions related to a labour dispute. Chief Justice Desjardins ordered that the amounts be refunded by crediting each subscriber's next bill.[203]

The Commission is of the view that the proposed *Class Actions Act* should specifically authorize defendant-administered direct distributions. We recommend that, under the proposed Act, where the court has made an aggregate award and the identity of any members of the class and the amount of monetary relief to which each is entitled can be determined from records in the possession, custody, or control of the defendant, the court should be able to direct the defendant to make such determinations and to distribute the amounts so determined to each class member directly by any means authorized by the court.[204] Under this recommendation, the court, for example, could order the defendant to credit class members' accounts.

It will be noted that, under our recommendation, the decision whether to order direct distribution by the defendant is within the discretion of the court and is not mandatory. There may be cases in which the court does not believe that a particular defendant will make a direct distribution of funds honestly or efficiently. In such a situation, although a direct distribution may still be appropriate, it should be administered by the court, or by some other entity, such as a trust company, under the court's control.

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[201] See *Partain v. First National Bank of Montgomery*, discussed *supra*, this ch., sec. 3(b)(v)a., for an example of such a distribution. For other examples of distributions based upon records of defendants, see Newberg. *supra*, note 69, §4600, at 82, *n.* .02.

[202] C.S. (Québec), le 2 novembre 1981 (No. 200-06-000003-791).

[203] *Ibid.*, at 38-40. Direct distribution by the defendant need not be restricted to cases where class members have current accounts with the defendant, but may be employed whenever the defendant has records of past transactions with class members from which the relevant amounts may be determined: see, for example, *Samuel v. University of Pittsburgh, supra*, note 112.

[204] See Draft Bill, s. 23(1).

b. Direct Distribution by the Court

The Commission recommends that, where there has been an aggregate assessment of monetary relief but the court does not order a direct distribution by the defendant, and the identity of any class members and the amount of monetary relief to which they are entitled can be determined without requiring evidence from such members, the court should so determine the amount to which each member of the class is entitled, and should order that the amounts so determined be distributed directly by any means authorized by the court.[205]

In such a situation, an appropriate initial step would be for evidence of the identity of, and the amounts owing to, the class members to be extracted from the defendant's records and produced before the court, so that an aggregate figure representing the defendant's liability could be calculated. The defendant would then be required to pay this sum into court or to some other body or person specified by the court for administration. Direct distribution of this fund could then proceed under the supervision of the court.

It should be noted that, under the Commission's recommendation, direct distribution by the court would not be restricted to cases where the necessary information is contained in records of the defendant. Rather, a court could undertake such a distribution whenever the identities of and the amounts owing to particular class members can be determined by any other reasonable means.[206] It should also be noted that, in order to minimize the burdens on class members and to maximize the number of members who achieve recovery, we have recommended that direct distribution by the court should be mandatory whenever the facts of the case permit.

(iii) Individual Distribution

Where direct distribution to the class by the defendant or the court is not feasible, there is general agreement that class members should have the opportunity to file individual claims.[207] We recommend that, except where the court orders a direct or average[208] distribution, class members should be

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[205] See Draft Bill, s. 24.

[206] For example, the identities and addresses of Firenza owners in *Naken, supra*, note 39, who had not disposed of their vehicles, might be determined from the computers of the Ontario government transportation ministry. Since the proposed measure of general damages for every class member would be identical, and proven in common proceedings, if the reliance requirement were eliminated by legislation, it might be feasible for the court to order that every such owner be sent a cheque for $1,000 directly, together with notice concerning any right to prove special damages that the court had recognized. See, also, Newberg, *supra*, note 69, §4600, at 82, and *Neely v. United States*, 546 F.2d 1059 (3d Cir. 1976).

[207] See, for example, "Federal Consumer Class Action Legislation", *supra*, note 197, at 22. See, also, Shlachter, *supra*, note 75, at 72, and Schwing, *supra*, note 69, at 122.

[208] See Draft Bill, s. 26(1), and discussion, *infra*, this ch., sec. 3(c)(iv). It should be noted that, even in the case of an average distribution, class members would have a right to prove their claims individually rather than accept a share of such a distribution: see Draft Bill, s. 26(2).

afforded a reasonable opportunity to claim their shares of an aggregate award.[209]

There is also agreement that, in such a case, it is legitimate to reduce the burdens placed upon class members in establishing their claims[210] through the adoption of informal, "administrative" procedures rather than formal judicial ones, except where this will create an unacceptable degree of inaccuracy. Procedures that have been suggested include the use of masters or committees of counsel to administer the claims process, distribution of standardized proof of claim forms to class members, the use of affidavits and other written evidence to provide the factual basis for the claims process in place of *viva voce* testimony, and the use of audits of a sample of these written claims to determine whether there is a real likelihood of fraudulent claims.[211] Such methods are valuable because they will reduce the economic costs of asserting a claim, by eliminating, for example, the need for legal advice, or for *viva voce* testimony that may require class members to be absent from work. Carefully designed notice and other procedures, including the pretesting of notices or proof of claim forms, or printing them in a variety of languages, may also be used to assist class members in asserting their claims.

The beneficial effects of such procedures, however, need to be balanced against the possibility that their relatively informal nature may allow unfounded claims to be accepted, thereby reducing the portion of the aggregate recovery that will be available to compensate *bona fide* class members.[212] Supporters of aggregate recovery argue that any measures to weed out fraudulent claims should not, as a practical matter, serve to preclude recovery by numerous persons who are, in fact, members of the class.[213] If the choice is between allowing the occasional unsubstantiated claim and denying recovery to persons who have been injured, the former alternative would appear to be the lesser of two evils.

In many, and perhaps most, class actions involving an aggregate award where the filing of individual claims is a necessity, the procedures required will be relatively uncomplicated, and proof of the amount of the individual's entitlement will be simple and inexpensive. In cases where the amount of each individual's entitlement has already been ascertained in the common proceedings, or where the amount of each individual's claim can be easily documented, the primary problem will be the identification or location of the class members. For example, in *Farnham* and *Van Gemert*,[214] the identity of

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[209] *Ibid.*, s. 25(1).

[210] "[T]he processing of claims may be simplified because a lesser standard of proof may be applied without jeopardizing the defendant's due process rights, defendant having been given full opportunity to challenge damages on a class basis at the trial": Newberg, *supra*, note 69, §4600, at 83. See, also, Harvard Developments, *supra*, note 70, at 1520.

[211] See Harvard Developments, *supra*, note 70, at 1520-21.

[212] See Gould, *supra*, note 75, at 175.

[213] See "Responses to the Rule 23 Questionnaire of the Advisory Committee on Civil Rules" (1978), 5 C.A.R. 3, at 13 (hereinafter referred to as "Rule 23 Questionnaire").

[214] See the discussion of these cases *supra*, this ch., sec. 3(b)(ii) and (i), respectively.

the individual stock or debenture holders, and the number of stocks or debentures that each of them held, might not be ascertainable without notice and the filing of individual claims.

This will not always be the case, however. If the identities of class members are unknown and the class is widely dispersed, or if the nature of the harm done is such that class members are unlikely to have records of the transaction, the administration of the individual claims process may be very difficult for the court and the class representative. Nevertheless, the American experience suggests that an effective distribution can be made to class members even in this sort of situation.

Exceptionally difficult problems of this kind existed in the second of the two antibiotics antitrust price-fixing class settlements,[215] in which there were at least three million class members dispersed throughout six states, whose identities were initially unknown. Moreover, because the settlement related to purchases of antibiotics made over a period beginning twenty years prior to the settlement, most class members were unlikely to have retained documentary proof of their purchases of the antibiotics that were the subject of the suit. In addition, because of the time that had elapsed, the class members were unlikely to have any clear memory of the amounts in question. Nevertheless, by using innovative methods, a determined judge and a group of creative counsel succeeded in achieving a substantial measure of compensation for class members with reasonable accuracy.

The antibiotics settlement will be described in some detail, not because it is typical, but precisely because it was a difficult case. The case may serve to help identify the administrative tools that Ontario judges might employ to manage effectively individual claims in other difficult cases. It is also unique among American class actions, in that it has been the subject of an in-depth empirical study,[216] which will serve as the basis for the discussion of the effectiveness of the distribution thus undertaken.[217]

The presiding judge delegated the day-to-day administration of the antibiotics settlement to a special master, assisted by counsel for the class representatives, a computer firm, and an advertising agency. The goal of the distribution process was to attempt to notify all class members in an intelligible manner of their right to file a claim. It was decided that the best way to accomplish this goal was to mail a simple, standardized proof of claim form to every household in the affected states.

This initial form, known as "Claim Form A", was designed to be readily comprehensible to individuals of diverse backgrounds, languages, and levels

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[215] *In re Antibiotic Antitrust Actions*, *supra*, note 80 (certification), and *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 706 (D. Minn. 1975) (settlement approval).

[216] Antibiotics Study, *supra*, note 198.

[217] Unless otherwise indicated, all information concerning the distribution process in the second antibiotics settlement is taken from Antibiotics Study, *supra*, note 198, ch. 2. For a more general discussion of potential approaches to individual distribution, see Newberg, *supra*, note 69, §4600, at 82-84.

of education. It also was designed to take account of the fact that the recipients would not ordinarily have access to the services of a lawyer, an accountant, or a secretary to assist them in completing the form. Because of the long time period that had elapsed since the purchases of the drugs in question, it was agreed that consumer estimates from memory would have to be allowed, subject to an appropriate system of safeguards. Therefore, consumers were asked to fill in Claim Form A to indicate the approximate number of prescriptions and the amount spent for each member of the household during the period in question, without requiring documentation. The form was pretested by the advertising agency with a number of consumers, and improvements were made as a result, such as including in the form an enumeration of the illnesses for which the drugs in question were commonly used.

Persons claiming purchases of $150 or less were required to file only Claim Form A. This figure was based on an estimate of slightly more than two prescriptions per year over the relevant thirteen year period. Class members with claims in excess of $150 were sent a second form, "Claim Form B", requesting the submission of either documentation or a more detailed description of the nature or duration of the illnesses in question, together with a notarized copy of Claim Form B. Alternatively, persons with such claims could merely send a signed, but unnotarized, form permitting the court to determine the fair amount of the refund; all such claims were ultimately reduced to $150.

Since the form was to be mailed third class bulk address rate as a self-mailing piece, addressed only to "Residential Patron/Local", and might be discarded as "junk mail" without being read, the advertising agency also designed a carefully coordinated programme of publicity to precede the mailing of the forms, so that consumers would be aware of the refund programme and would be expecting the mailing. Particular use was made of the public service facilities of newspapers, radio, and television.

Auditing procedures were established for Form B claims, which involved the larger amounts. All returned forms were examined in full by a screening team of clerical personnel, trained to look for completeness of proof, any references to inappropriate illnesses, drugs not covered by the suit, as well as other aberrant responses. The team was instructed to pass all questionable cases on to a committee of counsel from each of the six states for further review. In addition to cases that were found to be questionable or suspicious by the screening team, the committee of counsel audited a special statistical sample of the returned forms.[218]

Ultimately, claims covering seventy percent of the purchase amounts asserted by notarized forms were audited, while forty-four percent of all purchase dollars claimed through Form B were reviewed. In the course of

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[218] The claims were broken down by the total amount of claimed purchases, and the number of dollars spent per person per year. It was decided that all claims of persons claiming more than $1,000 in purchases, or with dollars per person per year greater than $60, would be sent to the committee of counsel for special review: Antibiotics Study, *supra*, note 198, at 32. A probability sample of the remaining claims was also selected for review by the committee of counsel: *ibid.*, at 40.

examining these proof of claim forms, members of the committee of counsel frequently would telephone the claimant or, with the claimant's permission, his doctor or pharmacist, to acquire additional information.[219]

Several checking procedures were established in order to obtain some assurance that even those claims for purchases of less than $150 were not fraudulent. A sample of 500 randomly selected persons who had filed Claim Form A, for which no written proof had been requested, were interviewed by telephone to determine how the respondents had arrived at the amount of their claims.[220]

An additional verification procedure involved the requirement that each claimant state his driver's licence number, if any. This permitted a check to see whether a single individual might have obtained and filled out numerous claim forms, since the computer could be instructed to look for duplicate licence numbers.[221]

After the processing of claims was completed, the Court directed that over 888,000 cheques, totalling $20,046,225.05, be mailed to consumers. The cheques were printed by computer in "self-mailer" forms, and were sent out within a year of the initial distribution of Claim Form A.

According to the Special Master, "[t]he total administrative costs involved [in this distribution process] were less than the moneys earned in interest by the settlement fund".[222] The authors of the "Antibiotics Study"

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[219] To help in determining the legitimacy of unusual drug purchases, the committee of counsel obtained the professional opinion of a doctor who had himself prescribed broad spectrum antibiotics in one of the six states during the relevant period: *ibid.*, at 33.

[220] Of the 253 claimants who had used some type of record to determine the amount of their claims, 73% said they would allow an investigator to see the documents, and 18% said they would not. Nine percent of the claimants said neither yes nor no to this question. They felt that permission would be necessary from the pharmacy, doctor or hospital, or that the documents were no longer available for examination. All 500 randomly chosen claimants were asked if they would authorize their doctors to allow an investigator to examine medical files of those persons represented in their claims. Seventy-five percent said they would, 19% said they would not grant permission, and the remaining 6% said the files were probably not available to anyone or did not exist anymore. The Special Master concluded that, "[s]ince many of those who did not grant permission might well have been motivated by factors other than fear that their claim was inaccurate (for example, some could have been reluctant to burden their doctor with any sort of investigation), these figures seem to represent a very high degree of consumer faith in the accuracy and honesty of their claims, and a consequent willingness to permit those claims to be subject to independent verification": see Lebedoff, *Special Master's Report and Plan of Distribution, In Re Antibiotic Antitrust Actions*, 4-71 Civ. 435 (D. Minn. 1975), excerpted in Antibiotics Study, *supra*, note 198, at 30.

[221] In order to check whether dishonest claimants might have used a different licence number on a number of claim forms, a 600 person probability sample of the claimants in California and Washington was selected and a list of driver's licences prepared. Only the licence numbers were submitted to the state motor vehicle bureaus, and the corresponding names and addresses were obtained. The addresses and telephone numbers for those without licences were checked by state investigators. In *every* case, the holder of the licence (or the resident) was found to be the same as the signer of Claim Form A.

[222] Antibiotics Study, *supra*, note 198, at 33.

further calculated that the approximately one million claims filed in response to "Operation Money Back" accounted for approximately one-half of the total dollars in retail purchases actually spent in the relevant period by the consumers in the six states.[223]

The "administrative" procedures in the antibiotics settlement provide an example of individual distribution techniques that strike a reasonable balance between facilitating recovery by initially unidentifiable class members with modest claims, and maintaining reasonable measures designed to determine the likelihood of fraud or major inaccuracies, especially with regard to large claims which, because of their size, were most likely to deplete unduly the settlement fund.

It would seem desirable that, under the revised Ontario class action procedure, the trial judge, and anyone appointed by him, should be allowed similar flexibility[224] in the processing of individual claims. This would permit an appropriate balance to be struck, based upon the facts of each individual case, between such legitimate considerations as reducing the burdens placed upon class members in order to minimize the number of persons with valid claims who do not achieve compensation, weeding out fraudulent or erroneous claims, reducing the administrative expenses that must be paid out of the aggregate monetary award, and minimizing the burdens placed upon the court. Accordingly, the Commission recommends that, for the purpose of establishing the individual claims of class members, the court should authorize such procedures as will minimize the burden upon the members of the class, including the use of standardized proof of claim forms designed to elicit the information necessary to establish and verify such claims, the reception of affidavit, documentary, or other written evidence, and the auditing of claims upon a sampling or other basis.[225]

(iv) Average Distributions of Aggregate Awards to Individual Class Members

Once it is accepted that "mini-trials" are not a prerequisite in all cases to a satisfactory distribution of aggregate awards, the most significant remaining controversy associated with the process of distribution to individual class members concerns the propriety of making "average" damage awards to particular members of the class when a more precise determination of the injury suffered by each person is not feasible.

In the United States, this issue has received the greatest attention in the context of certain civil rights and labour cases, where the facts make it

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[223] The distribution took account of only 38% of the total dollars spent, however, because recovery of some amounts actually spent was prevented by failure to deliver Claim Form B to original claimants, failure by those who did receive the form to return it, and the automatic reduction of unnotarized claims in excess of $150: *ibid.*, at 53.

[224] For a general discussion of the need for flexibility in claim verification, design of proof of claim forms, and other processing procedures, see Newberg, *supra*, note 69, §4600, at 83-84.

[225] See Draft Bill, s. 25(2).

possible to determine, with reasonable accuracy, both the total loss suffered by class members and the identity of the persons who are members of the class. However, in such cases it may be impossible, as a practical matter, to determine precisely the identity of the persons who have suffered the loss. This kind of problem typically occurs where it is reasonable to conclude that, in the absence of discriminatory practices, a given number of class members would have obtained or retained employment of a particular kind, but the number of equally qualified class members exceeds the number of vacancies.

When faced with the suggestion that they should deny recovery to all members of the class because specific recipients cannot be identified, a number of United States federal appellate courts have held that it is preferable to determine the total income that was lost to those unidentifiable persons who would have obtained particular jobs, and to allocate it among all qualified individuals upon an average or *pro rata* basis.[226] Since the total award must be spread across a larger number of persons, some who would not have been so employed may receive "back pay", while the average "back pay" received by all will be less than would have been earned by a claimant who could successfully establish a certainty of employment. Courts that have adopted this approach view this result as a lesser evil than the denial of monetary relief to all class members where it is clear that some of them have been injured.

Judgments approving average pay awards are not restricted to civil rights cases, however. As long ago as 1941, in *F.W. Woolworth Co. v. N.L.R.B.*,[227] the Court of Appeals for the Second Circuit approved a similar approach to the calculation of back pay for employees improperly laid off on the basis of union membership. In that case, some, but not all, of the union members would have been laid off in any event, but it was impossible to identify "the actual victims of discrimination".[228]

Although it is unlikely that Ontario courts will be confronted with many such cases, there is a possibility that this problem may arise in the employment and civil rights areas.[229] Indeed, it is arguable that the *Northdown Drywall*[230] case, previously discussed,[231] involves precisely this kind of difficulty. For this reason, it may be useful to set out the observations of Galligan J. in relation to the distribution problems posed by the facts of that case. Mr. Justice Galligan stated:[232]

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[226] *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974), at 260-63; *United States v. United States Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975), at 1055-56; and *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), at 452-53. See, also, *Senter v. General Motors Corp., Inland Division*, 383 F. Supp. 222 (S.D. Ohio 1974), at 229.

[227] 121 F.2d 658 (2d Cir. 1941).

[228] *Ibid.*, at 663.

[229] For a discussion of some of the possible causes of action in these areas, see *supra*, ch. 5, sec. 3(a)(ii).

[230] *Northdown Drywall & Construction Ltd. v. Austin Co. Ltd.* (1974), 6 O.R. (2d) 223 (H.C.J.), rev'd in part (1975), 8 O.R. (2d) 691 (Div. Ct.).

[231] See *supra*, this ch., sec. 3(b)(ii).

[232] (1974), 6 O.R. (2d) 223 (H.C.J.), at 225 and 226.

In this case the loss of the Travelodge International job by [the plaintiff subcontractor] meant that the members of Local 562 would be denied the opportunity of working on that job. It is difficult of course to say which precise members of the local might have been selected to work on that particular job, and it is difficult to say which of the members of the local were deprived of employment because of the loss of that job.

. . . .

While it may be a matter of some nice difficulty to determine precisely what the damages suffered by the members of this local are, the Courts have never hesitated to assess damages where a loss has been proved, even if such assessment amounts to little more than an educated guess. I conceive it to be the duty of the Court in a case such as this to assess damages even if it is difficult to do so if some loss has been established. If the case goes to trial and it should be determined that the defendants wronged the members of Local 562 and that economic loss was suffered by the members of the local as a class, then the damages so suffered can be assessed.

Proceedings subsequent to the trial may be taken to determine how those damages ought to be distributed among the various members of Local 562. Once the total damages which the defendants caused to Local 562 have been determined, there would be no need for the defendants to attend upon proceedings to determine the allotment of damages among the various members of the class. The possibility of some form of subsequent proceedings for that purpose was recognized by the Ontario Court of Appeal in *Farnham et al. v. Fingold et al.*, . . . and by the British Columbia Court of Appeal in *Shaw v. Real Estate Board of Greater Vancouver.*

It should be noted, however, that, since Galligan J. was considering only a motion by the defendants to dismiss the action on the basis that it did not come within Rule 75, it was not necessary for him to deal expressly with the appropriateness of an average damage distribution.

The Divisional Court overruled Galligan J.'s decision that the case should be allowed to proceed as a class action with respect to income losses suffered by class members.[233] The Divisional Court, however, did uphold the maintenance of the class action with regard to the loss to the union of salary check-offs. It is difficult to see how these amounts could be ascertained without a determination of how many union members would have been employed, how many hours they would have worked, and the total amounts that they would have been paid as a result of such employment.

If such a determination is feasible, proper, and fair to the defendant with regard to check-offs, why should a court not be permitted to go further and give judgment for the total amount of wages that would have been earned? Any problems of distribution in such a situation more properly concern the

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[233] The Divisional Court decision appears to be premised upon the narrow limits that have traditionally been placed upon damage class actions under Rule 75, and upon a very narrow interpretation of *Farnham v. Fingold, supra*, note 40. The Divisional Court does not comment upon the question of fairness or unfairness to the class members of the distribution process that might follow an aggregate award in the context of the *Northdown* fact situation, since it assumes that the assessment must be made on an individual basis.

class members than the defendant, and the average distribution procedure would seem to provide a viable solution for such difficulties.[234]

The cases discussed above deal with the situation where the nature of the injury renders impossible the determination of which class members have suffered loss. Another situation where problems of impracticability may necessitate an "average" distribution, if there is to be effective compensation, occurs where the unavailability of records renders impossible individualized assessment of monetary relief owing to class members, even though evidence is available from which an aggregate assessment can be made.

This was the case in *Barr v. WUI/TAS, Inc.*[235] In *Barr*, a class action was brought by a doctor, asserting a price-fixing claim against a telephone answering service. The presiding judge approved a settlement plan in the following terms:[236]

> Within each region, the amount attributed to it shall be distributed equally among its class members. The reason for an equal distribution within a region is that there is no method of determining the precise amount that any particular subscriber was overcharged. Thus, by an equal distribution, we are assured that each injured member will recover something.

Since the defendant's records were specifically audited in producing the aggregate overcharge figure, it may reasonably be assumed that the records did not permit a determination of the amount of the overcharge imposed upon specific customers. It is unlikely, in such a case, that any individual class member would be able to provide evidence of the amount of the overcharge imposed upon him or her by the defendant.

Another situation in which the determination of the size of claims on an individual basis may be rendered impracticable is where there is a sufficiently large class membership compared to the amount at stake that the costs of full scale individual claim procedures would render claims nonviable, or where

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[234] In labour and civil rights cases of the sort described above, problems may arise in situations where class members have mitigated their loss by finding alternative employment. On the one hand, the amount earned in such employment may vary from class member to class member so that giving final judgment for an aggregate award against the defendant without resolution of the mitigation issue would seem inappropriate. On the other hand, common proof of the amount that could have been earned by the class members in the absence of the defendant's misconduct, and attribution of an average share of that amount to each class member, is the only feasible means of measuring the loss that is to be mitigated in cases of this sort.

In such a case the appropriate solution would be for the Courts, as part of their general power to determine common questions, to allow the use of common proof to establish the total initial loss and an appropriate aggregate share without giving judgment for the payment of an average award. This process could then be followed by individual proceedings designed to determine the amount by which each individual's average share should be reduced on account of alternative employment.

[235] *Barr v. WUI/TAS, Inc.*, 1976-1 Trade Cases ¶60,725. Arguably, a similar result could have been achieved in *E.M.I. Records Ltd. v. Riley*, [1981] 1 W.L.R. 923, [1981] 2 All E.R. 838 (Ch.).

[236] *Barr v. WUI/TAS, Inc.*, *supra*, note 235, at 68,117-18.

administrative costs would consume the available fund.[237]

Support for forms of distribution that give class members average amounts has not been unanimous. Much of the opposition is premised on the assumption that any relief to claimants that is not proved with exactitude by a specific individual is unfair to the defendant.[238] However, this argument is directed primarily to the propriety of aggregate assessment of monetary relief, as opposed to the distribution of the resulting fund, and was previously discussed and rejected with respect to those cases that lend themselves to a sufficiently accurate calculation of the total amount of the defendant's liability.

The alternative argument against such distributions is reflected by the case of *Ralston v. Volkswagenwerk, A.G.*[239] It is based upon the proposition that such an approach to distribution is unfair to the class members. In *Ralston*, Urbom J., in refusing to certify the class action on grounds of unmanageability, remarked:[240]

> If a class action were declared, the members of the class would be parties whose rights would be directly affected by the action. In the absence of agreement of all of them, it is unacceptable to utilize an average or formula damage figure to determine the damages of each individual member of the class.
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> . . . .
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> Any individual member of the class should have the right to come forward with evidence . . . .

One may sympathize with Urbom J.'s concern about the rights of class members, and agree that they should have the opportunity to establish claims

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[237] See, for example, *In re Arizona Bakery Products Litigation*, 1976-2 Trade Cases ¶61,120. In this case, the State of Arizona, acting as class plaintiff, attempted to find a solution to such a problem by carrying out a sample survey of consumers designed to determine the average amount of bakery products consumed by households of different sizes for each of the years 1969 to 1973. Average retail prices at which various bakery products were offered for sale in these years were determined through defendants' pricing records and the records of retail sales by grocery stores throughout the state. These combined figures yielded average expenditures per household, over the five year period, which varied from $248.96 for one person households to $923.06 for those that contained six people or more. The Court approved these figures as a basis for a consumer claim formula. Subsequently, 245,387 damage cheques based upon this formula, and averaging $9.60, after deduction of fees and costs averaging $1.41 per claimant, were mailed to Arizona citizens, identified through tax records, who had been required only to state the sizes of their households and confirm their Arizona residencies during the relevant period. Computerized tax returns were used to audit the number of household members listed by each claimant and to detect multiple claims from the same address.

See, also, *In re Arizona Dairy Products Litigation*, 1979-1 Trade Cases ¶62,605.

[238] See Mott, "Harnessing Class Back Pay Relief Under Title VII: A Return to the Theory of Compensation" (1975), 4 C.A.R. 169, and a critique thereof at (1975), 4 C.A.R. 178; Barnard, "Title VII Class Actions: The 'Recovery Stage' " (1975), 16 W. & M.L. Rev. 507; and *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, *supra*, note 53, at 55.

[239] 61 F.R.D. 427 (W.D. Mo. 1973).

[240] *Ibid.*, at 432 and 433.

that vary from the average where the amount at stake and the nature of the injury make individualized proceedings feasible. It is quite another thing to hold that an average distribution is improper where the nature of the harm done makes the precise allocation of damages impossible, or where the cost of individualized proof is such as to prevent the class members from asserting their claims, as was arguably the case in *Ralston* itself.[241]

The Commission believes that the utilization of an average distribution procedure is in the best interests of class members in the kinds of case discussed in this section. We therefore recommend that, where the court makes an aggregate assessment, but the circumstances render impracticable the determination of those class members entitled to share in the award or the exact share that should be allocated to particular class members, the court should be empowered to order that the members of the class are entitled to share in the award on an average or proportional basis where the failure to do so would deny recovery to a substantial number of class members who have been injured.[242] We are also of the view that, where an average or proportional distribution is ordered, class members should have the right to apply to the court to be excluded from such distribution, and to prove their claims on an individual basis if they believe that this is feasible. Any amount recovered by class members on an individual basis should be deducted from the amounts to be distributed on an average or proportional basis. We so recommend.[243]

(v) *Cy-Près* Distribution for the Benefit of the Class

a. Nature of Cy-Près Distribution

Despite the best efforts of counsel and judges, there may still be cases in which a residue of an aggregate award will remain after all feasible efforts at distribution to individual class members have been made. Such a residue may result from a variety of factors, including problems of identifying class members and giving them intelligible notice, economic, psychological, or social barriers that may prevent class members with notice from taking action, and high administrative costs that make individual distribution a wasteful approach from the outset.[244]

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[241] House Comm. on the Judiciary, *Report on Clayton Act Amendments of 1978 to Accompany H.R. 11942* (Aug. 10, 1978), in 876 Antitrust & Trade Reg. Rept. (Supp. No.1), at 7. This latter argument is clearly expressed in a comment on the *Ralston* case by the Committee on the Judiciary of the United States House of Representatives, in the context of a proposed statutory provision that would expressly reverse Urbom J.'s ruling:

> [T]he *Ralston* court was concerned that by giving all class members the average damages, it might be giving some of them less than their due. It therefore dismissed the class action, thereby effectively denying all injured persons in the class any recovery.

[242] See Draft Bill, s. 26(1).

[243] *Ibid.*, s. 26(2).

[244] See Gordon, *supra*, note 72, at 724.

When faced with these problems, it has been suggested that the most desirable approach for a court administering the residue of an aggregate assessment is to attempt to find some method of applying the remainder of the aggregate damage award that will indirectly benefit uncompensated class members.[245] In support of this "next best" form of compensation, an analogy is drawn to the well established doctrine of *cy-près* in the law of charitable trusts.[246] This equitable doctrine permits a court to direct that a fund dedicated to a charitable purpose that has become impossible or impractical be applied instead to another charitable purpose that approximates "as nearly as possible" the settlor's original intent.[247] It is argued that the equitable jurisdiction of the courts is sufficiently broad and flexible to permit the development of an analogous power to apply the residue of an aggregate award in a manner that would achieve, "as nearly as possible", the objective of providing redress to class members.

The purpose to be served by *cy-près* distributions, as the term is defined in this Report, is the "compensation"[248] of class members.[249] This section of this chapter will, therefore, focus upon those schemes for distribution of the unclaimed portion of an aggregate fund that are designed to confer a benefit that approaches "as nearly as possible" some form of recompense for injured class members.

No narrow delineation[250] can be placed upon the class action distribution schemes that may be designed to serve this function, because the nature

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[245] See Newberg, *supra*, note 69, §4260, at 85-86; Deems, *supra*, note 75, at 904-05; Schwing, *supra*, note 69, at 122; and Management Problems under Rule 23(b)(3), *supra*, note 68, at 363.

[246] See Deems, *supra*, note 75, at 904 (emphasis added):

> The doctrine of *cy pres* originated in the law of trusts. *Cy pres* has been defined as 'the doctrine that equity will, when a charity is originally or later becomes impossible, inexpedient, or impractical of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible.'
>
> Thus *cy pres* comes to class actions by analogy . . . . When the entire damage fund is not claimed by class members, the *cy pres* approach allows the fund to be put to its 'next best' use. *In effect the court is saying that since individual redress is impossible or infeasible, the fund should be used for the 'next best' available purpose which furthers the original purpose of compensation of individual victims.*

See, also, Wright and Miller, *supra*, note 69, §1784, at 125; Harvard Developments, *supra*, note 70, at 1522; Schwing, *supra*, note 69, at 124; and Shepherd, *supra*, note 75, at 452.

[247] For a more detailed discussion of the doctrine of *cy-près* as it applies to trusts, see Sheridan and Delany, *The Cy-Près Doctrine* (1959), at 4-5, 10, 39, 42, 154, and 158. See, also, Waters, *Law of Trusts in Canada* (1974), at 515-34, and Bogert, *The Law of Trusts and Trustees* (2d ed., 1964), §§431-50.

[248] It will be noted that this use of the word "compensation" is not precise, since this word properly applies only to awards of damages as distinct from awards of restitution or monetary relief derived from statutes. Nevertheless, it will be convenient to use this word in the *cy-près* context to refer to all kinds of monetary relief to which class members are legally entitled, or the application thereof for their benefit by some means other than direct payment.

[249] See Deems, *supra*, note 75, at 904, and Gordon, *supra*, note 72, at 725.

[250] Deems, *supra*, note 75, at 906.

of the best approximation to relief for class members will vary dramatically from case to case.[251] The discussion, however, has tended to focus closely upon two possibilities. The first involves a "benefit" distribution,[252] where the residue is turned over to some public or private body for use in a manner that will confer a substantial benefit upon the class members. The second possibility is a "price reduction" distribution,[253] whereby the defendant is instructed to return the residue to the class through price reductions where a substantial proportion of the class will continue to purchase the product or service that is the subject of the class action.[254] We turn now to discuss examples of both types of *cy-près* scheme.

It is of interest to note that these kinds of *cy-près* distribution have been employed in class and nonclass actions alike. However, because of the chilling effect of the decision in *Eisen III,*[255] which rejected *cy-près* distributions, it would appear that the only American class action cases in which such distributions have been approved are cases involving settlements.

b. "Benefit" Cy-Près Distribution Schemes

The case generally cited as representative of a "benefit" *cy-près* distribution is a nonclass action, *Market St. Ry. Co. v. Railroad Commission of the State of California.*[256] In this case, the Supreme Court of California dealt with a dispute over the disposition of excess "street railway" fares collected after a court's stay of an order reducing the Market Street Railway's fares from seven to six cents. This order was subsequently upheld, leaving the Court and the parties with the problem of refunding to the patrons the amounts that had been improperly collected. An individual refund procedure succeeded in returning only a very small portion of the accumulated overpayments to individual claimants. The Court, therefore, ordered that the residue of the fund be paid to the City of San Francisco, which had purchased the railway system from the defendant in a deteriorated condition, in order that the fund

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[251] Existing or proposed class action legislation that deals expressly with the question generally has given courts a broadly defined power to make *cy-près* distributions. See, for example, South Australia Draft Bill, *supra*, note 58, s. 10(6); U.C.A.A., *supra*, note 148, §15(c)(5) and (7); C.C.P., *supra*, note 146, art. 1036; and N.J. R. Civ. P. 4:32-2(c), discussed *infra*, this ch., sec. 3(c)(v)f.

[252] For example, the class action residue in the first Antibiotics settlement: see *State of West Virginia v. Chas. Pfizer & Co., Inc.*, 440 F.2d 1079 (2d Cir. 1971).

[253] See Harvard Developments, *supra*, note 70, at 1522; Deems, *supra*, note 75, at 905; and Gordon, *supra*, note 72, at 724, *n.* 88.

[254] It should be noted that, under both schemes, there would be no costs of asserting a claim for class members who benefit, so that there would be no such thing as a claim that is nonviable from the class members' point of view. It is conceivable, however, that, where the residue is very small, the administrative costs of a price reduction distribution might exceed the amount at stake; in such a situation, distribution might be considered administratively, as distinct from individually, nonviable.

[255] *Supra*, note 83.

[256] 28 Cal. 2d 363, 171 P.2d 875 (S.C. 1946) (subsequent references are to 171 P.2d).

could be applied to improve the properties, thus indirectly benefiting the users who had paid the overcharge.[257]

The principle in *Market St. Ry. Co.* was affirmed in *Olson v. County of Sacramento,*[258] another California appellate court decision. In this nonclass action case, the plaintiff sued the County of Sacramento for breach of an exclusive garbage franchise, and the county filed a cross complaint "as trustee" for moneys collected from householders through the exercise of the franchise, which it alleged was fraudulently obtained. Insofar as the disposition of any moneys was concerned, the Court observed:[259]

> If, in the case at bench, it is found to be impracticable to distribute any recovery obtained by the county in this action to the householders who paid the garbage rates under the void contract, such recovery can be used in other respects for the benefit of the county's householders.

An example of a "benefit" distribution in the class action context is the first antibiotics settlement, *State of West Virginia v. Chas. Pfizer & Co., Inc.*[260] In that case, the Court of Appeals for the Second Circuit approved a settlement in which the class members were notified that a failure on their part to file an individual claim would constitute an authorization to the state Attorneys General representing the class to apply any unclaimed moneys for the benefit of the citizens of the state in such manner as the Court might direct.[261]

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[257] *Ibid.*, at 880-81. The Court, at 881, justified this result on the basis of the following reasoning:

> The fund here involved was accumulated by what has been determined to be an unlawful exaction from the patrons of that system. In equity and good conscience it would seem that the fund should be made available for the benefit of those who were compelled to submit to this unlawful exaction even though most of them deemed it unnecessary or inconvenient to pursue the refunds, small individually, but very substantial in the aggregate. The individual refunds averaged about $2.00, and were made only on written application of the claimant under oath at the office of the company. Equitable considerations dictate that the people of the city, who contributed the moneys and who now own and operate the properties which furnished the service when the excess fares were paid, are entitled to have them distributed for their benefit in the rehabilitation of the physical properties which were acquired during the pendency of the review proceeding, and for the improvement of the service afforded thereby. The distribution of the fund in that manner and its application to the purpose specified will inure to the benefit of those whose payments accumulated the fund, including both the people of the city and outsiders who have occasion to avail themselves of the service.

[258] 274 Cal. App. 2d 316, 79 Cal. Rptr. 140 (Dist. Ct. App. 3d 1969) (subsequent references are to 79 Cal. Rptr.).

[259] *Ibid.*, at 145.

[260] *Supra*, note 252.

[261] *Ibid.*, at 1083 and 1091. The individual distribution process in the first antibiotic settlement was obviously much less effective than that in the second one, since only 38,000 claimants from 43 states recovered in the first settlement, as opposed to 888,000 from six states in the second. The unclaimed residue was ultimately applied to a number of public health projects, such as drug abuse programs, lead poisoning and sickle cell anemia research, and community health clinics: see Shepherd, *supra*, note 75, at 457.

c. "Price Reduction" Cy-Près Distribution Schemes

The second means of providing an indirect benefit to class members that has been suggested frequently is to order the defendant to lower the market price of its product until an amount equal to the residue of the fund has been consumed, where it is expected that class members will have repeated dealings with the defendant. This device, too, is supported by precedent in the nonclass action context. For example, in *Bebchick v. Public Utilities Commission*,[262] the Court of Appeals for the District of Columbia Circuit, after invalidating a transit fare increase, left the body supervising the transit company with a discretion as to how the resulting fund might be applied for the benefit of the class members. The Court suggested, however, that the fund might be applied to prevent future fare increases or to achieve a reduction in fares.[263]

The use of the market mechanism to return a fund to consumers also has been undertaken or proposed in three prominent class action settlements. The first of these class actions was another California case, *Daar v. Yellow Cab Co.*,[264] a price-fixing case in which it was claimed that the defendant had altered the meters of its cabs to charge more than the rate permitted. A $1,400,000 settlement was reached, under which the defendant agreed to reduce its fares until the amounts remaining after individual distribution were eliminated.[265]

Colson v. Hilton Hotels Corp.[266] was an antitrust class suit in which another settlement calling for a price reduction was approved. In that case, it was alleged that the defendants had conspired to increase their rates through an improper charge on incoming phone calls. The settlement called for the unclaimed balance of the resulting fund to be credited for the benefit of future guests at the rate of fifty cents per occupied room per stay.[267]

The price reduction scheme that has generated the most controversy, however, was Judge Tyler's proposed distribution procedure in the *Eisen* case. As pointed out earlier, Tyler J. proposed that the residue of any aggregate award could be returned indirectly to the class members by reducing the odd-lot differential charged by the defendants; in the view of Judge Tyler, there was a sufficient pattern of repetitious transactions by class members that they could be expected to benefit from the reduction.[268]

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[262] 318 F.2d 187 (D.C. Cir. 1963), *cert.* denied 373 U.S. 913 (1963).

[263] *Ibid.*, at 203-04.

[264] 67 Cal. 2d 695, 433 P.2d 732 (S.C. 1967).

[265] The settlement unfortunately does not appear to have been reported, although it has been described and discussed in the literature on monetary relief in class actions. See, for example, Newberg, *supra*, note 69, §4620, at 85, and Notice, Mini-hearings and Fluid Class Recovery, *supra*, note 91, at 281-82.

[266] 59 F.R.D. 324 (N.D. Ill. 1972).

[267] *Ibid.*, at 325-26.

[268] *Eisen v. Carlisle & Jacquelin*, *supra*, note 99, at 262-65.

d. Cy-Près Distribution and "Windfalls"

Cy-près schemes have been strongly condemned by a number of American courts. The best known such statement is that of the Court of Appeals for the Second Circuit in the *Eisen III*[269] decision reversing the judgment of Tyler J. As will be recalled, the Court of Appeals flatly rejected the *cy-près* distribution scheme proposed by Judge Tyler. It would seem that the Court's rejection was based on its view that it was unfair to the class, and possibly to the defendant, to distribute an aggregate award of monetary relief in a manner that would confer a "windfall" upon persons who were not members of the class, or upon class members who had already filed and recovered upon individual claims. The Court of Appeals came to this conclusion, even though such a "windfall" was an incidental effect of providing compensation to class members who would otherwise not be able to recover.[270]

This decision of the Second Circuit Court of Appeals was appealed to the United States Supreme Court, which disposed of the case without ruling on the *cy-près* issue.[271] The status of *cy-près* distributions under Rule 23 in the United States, therefore, remains in a state of limbo. In the absence of a clear statement from the Supreme Court, other American judges have shown a tendency to defer to the Court of Appeals for the Second Circuit.[272]

The *Eisen III* decision has been severely criticized by many commentators,[273] including the authors of a leading American civil procedure text.[274] It

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[269] *Supra*, note 83, at 1010-12 and 1017-18.

[270] The Court also endeavoured to distinguish *Bebchick, Pfizer*, and *Daar* as precedents for *cy-près* distributions, on the ground that *Bebchick* was a nonclass action case, *Pfizer* involved a settlement, and *Daar* was decided under a state class action statute: *ibid.*, at 1012.

[271] *Eisen IV, supra*, note 106. The Supreme Court in *Van Gemert IV, supra*, note 118, again expressly refused to decide this issue.

[272] See, for example, *In re Hotel Telephone Charges, supra*, note 83, at 89-90. This case dealt with unsettled litigation arising out of the same fact situation as the *Colson* case described earlier. The Ninth Circuit Court of Appeals did not refer to the *Colson* settlement at any time in its decision, despite the fact that the decision in *Colson* had been handed down two years earlier.

[273] See, for example, Schwing, *supra*, note 69; Note, "Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs by Defendant in Class Action Rejected" (1973), 73 Colum. L. Rev. 1641; Managing the Large Class Action, *supra*, note 69; and Note, "*Eisen v. Carlisle & Jacquelin* – Fluid Class Recovery and Notice Requirements in Rule 23(b)(3) Class Actions – A Strict Approach", [1973] Utah L. Rev. 489 (hereinafter referred to as "Fluid Class Recovery and Notice Requirements").

[274] See Wright and Miller, *supra*, note 72, (Curr. Supp. 1981), §1784, at 96-97 (footnotes omitted):

> This decision can be criticized as representing a mechanical and unsympathetic reading of Rule 23 and one that completely ignores the courts' discretion to fashion relief.
>
> . . . .
>
> The social desirability of establishing a single comprehensive figure as a class award in one damage proceeding is enhanced by the prospect of the court applying something akin to the cy pres principle to any portion of the recovery that is not distributed to individual claimants.

is suggested that the possibility that *cy-près* schemes may give rise to "windfalls" does not necessitate the rejection of all such distributions, but rather indicates that suitable standards should be developed to determine when *cy-près* distributions are appropriate.

Supporters of *cy-près* distributions agree that the possibility that nonclass members or class members whose claims have been satisfied will benefit under such a distribution is a relevant consideration in deciding whether a *cy-près* distribution is proper. If a specific price reduction, for instance, were to benefit large numbers of nonclass members, while benefiting few uncompensated members of the class – for example, because the nature of the defendant's product was such that no ongoing pattern of repeated sales to members of the class could be expected, or because the composition of the defendant's customers had changed substantially since the time of the original wrong[275] – commentators would agree that such a price reduction would be an improper use of an aggregate damage award.[276] In such a case, the test should be whether uncompensated class members are likely to enter into repeated dealings with the defendant, and whether they comprise a reasonable proportion of the persons who will benefit from the reduction.[277] It is of interest to note that, in contrast to *Eisen III*, in a number of American cases that have considered the propriety of *cy-près* distributions, the courts, while rejecting such a distribution on the facts of the particular case, have focused upon the question whether there is a reasonable overlap between the group of persons who will be benefited by the *cy-près* scheme and the class injured by the conduct of the defendant.[278]

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[275] An example of a case of this sort is in *City of Philadelphia v. American Oil Company*, 53 F.R.D. 45 (D.N.J. 1971), a case involving a gasoline price-fixing dispute. The judge in that case observed as follows, at 72:

> [A price reduction] solution to the problems of awarding damages to individual claimants is not realistically available for the group here under consideration. The motorist who purchased gasoline from a retail station during the relevant period is still likely, if he has not moved out of the trading area, to continue his purchases of gasoline. However, he will be joined by many persons who were either not old enough to have had a driver's licence or were not residing in the trading area between 1955 and 1965. Any fluid class recovery would be a windfall to them and a deprivation to the motorist entitled to recovery. This Court, believing that the composition of the motoring public which purchased from retail stations has changed considerably during and since the alleged conspiracy ended, concludes that there can not be a fluid class recovery for this group of the Philadelphia – New Jersey class. Hence, the Court must consider the problems it will face when individual motorists begin filing damage claims.

The *Eisen* case may also have involved problems of this sort, because of changes in the population of odd-lot traders since the time of the defendants' alleged misconduct: see *Eisen III, supra*, note 83, at 1010-11.

[276] See Management Problems under Rule 23(b)(3), *supra*, note 68, at 363.

[277] See Newberg, *supra*, note 69, §4620, at 85; Manageability of Notice and Damage Calculation, *supra*, note 69. at 370-72; and Note, "Federal Procedure – Class Actions Under 1966 Amendments to Rule 23 – Notice and Damage Distribution – Eisen v. Carlisle & Jacqueline [*sic*], 479 F.2d 1005 (2d Cir. 1973)" (1973), 4 Tol. L. Rev. 180, at 195-96.

[278] See, for example, *Bangor and Aroostook Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen*, 442 F.2d 812 (D.C. Cir. 1971), where the Court approved of *cy-près* distributions in principle; *Blue Chip Stamps v. Superior Court of Los Angeles County*, 134 Cal. Rptr. 393, 556 P.2d 755 (S.C. 1976); and *Van Gemert II, supra*, note 118, at 815-16.

Where *cy-près* distribution supporters would part company with the *Eisen III* Court is over the assumption that, from the uncompensated class member's point of view, it is better to receive no compensation than to receive compensation that is rendered imperfect by the limited participation of undeserving third parties.[279] They would argue that, where the amount received by proper recipients exceeds the amount paid to such third parties, the "windfalls" should be regarded as a necessary cost of providing at least partial recovery to class members who would otherwise receive nothing.[280] They would further contend that to return money to the defendant that could be used to give some benefit to such persons is to give a "windfall" to the wrongdoer.[281]

e. Price Reduction Cy-Près Distributions and Market Distortion

In considering the propriety of *cy-près* distributions, the Commission has considered another argument directed solely against the price reduction form of *cy-près* distribution. It has been suggested that such judicially required price reductions will distort the operation of the market, and therefore give the defendant an unfair price advantage over its competitors.[282] While this argument has been criticized,[283] many supporters of *cy-près* distributions are prepared to agree that this is a factor that should be weighed against a price reduction distribution in competitive markets where customers can easily shift from one supplier to another, and where only some of the competitors would be subject to such an order.[284] They would argue, however, that price reduction orders may still be proper where the defendant has a monopoly, or where all the sellers of the particular product are defendants and will be obliged to reduce their prices equally, and where the reduced prices are not likely to attract purchasers at the expense of substitute products. For example, consumers are not likely to shift in large numbers from using electricity in their homes to using gas merely because the price of gas has been temporarily reduced as a result of a class action. Thus, what is required, it is contended, is not a general ban on *cy-près* distributions, but rather a discretion in the court to determine whether a particular *cy-près* distribution is appropriate.

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[279] Manageability of Notice and Damage Calculation, *supra*, note 69, at 372; Managing the Large Class Action, *supra*, note 69, at 450; and Newberg, *supra*, note 69, §4620, at 88.

[280] Managing the Large Class Action, *supra*, note 69, at 449-50.

[281] Fluid Class Recovery and Notice Requirements, *supra*, note 273, at 498. In this context, it may be of interest to note the observation of the Court of Appeals for the Third Circuit in the *Samuel* case that decertification of the class in that case would "result in a windfall of thousands of dollars to the Universities which rightfully belongs to the students": *Samuel v. University of Pittsburgh*, *supra*, note 112, at 997.

[282] See Newberg, *supra*, note 69, §4620, at 85; Dam, "Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest" (1975), 4 J. Legal Studies 47, at 63; Shepherd, *supra*, note 75, at 461-63; and Durand, "An Economic Analysis of Fluid Recovery Mechanisms" (1981), 34 Stan. L. Rev. 173, at 186-91.

[283] See "Federal Consumer Class Action Legislation" (1975), 4 C.A.R. 3, at 23, *n.* 30.

[284] See Newberg, *supra*, note 69, §4620, at 85; Deems, *supra*, note 75, at 905; and Durand, *supra*, note 282, at 186-91.

f. Statutory Authorizations of Cy-Près Distribution

While courts in the United States have been hesitant to allow *cy-près* distributions, a variety of rules or statutes have been proposed, and in some cases enacted, that would authorize this form of distribution.

For example, section 15(c)(5) of the American Uniform Class Actions Act[285] authorizes the court to distribute to the defendant or the state any funds that cannot be distributed to members of the class individually. The Act would seem to permit, at least implicitly, price reduction distributions or other schemes for the benefit of the class that are carried out by the defendant, since it specifies in section 15(c)(7) that the court, "in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him" from any residue not paid over to class members. There is no provision for *cy-près* distributions to non-governmental bodies, however, and the provisions authorizing distributions to the state[286] appear to be purely deterrent in nature, since there is no requirement that the sums be used for the benefit of the class members.

The Quebec class action legislation, although somewhat obscure on this point, appears to authorize *cy-près* distributions. Article 1036 of the *Code of Civil Procedure*[287] provides that, "[t]he court disposes of the balance in the manner it determines, taking particular account of the interest of the members [of the class], after giving the parties and any other person it designates an opportunity to be heard". This language seems broad enough to permit the court to order any *cy-près* distribution it deems appropriate, without the restrictions contained in the Uniform Class Actions Act.

One of the most interesting provisions is New Jersey Civil Practice Rule 4:32-2(c),[288] which provides that "[i]n any class action, the judgment may, consistent with due process of law, confer benefits upon a fluid class whose members may be, but need not have been members of the class in suit". This provision is noteworthy because it specifies that the possibility of "windfalls" to nonclass members will not automatically preclude a *cy-près* distribution.

Another interesting provision is to be found in section 10 of the Draft Bill for a Class Actions Act proposed by the Law Reform Committee of South Australia.[289] This provision would allow a *cy-près* distribution, but only where the Attorney General proposes the scheme in question.[290] If the Attorney General does not propose a *cy-près* scheme, the court's authority

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[285] U.C.A.A., *supra*, note 148.

[286] *Ibid.*, §15(c)(5), (6), and (8).

[287] C.C.P., *supra*, note 146.

[288] N.J. R. Civ. P. 4:32-2(c), noted in *Kronisch v. Howard Savings Institution*, 335 A.2d 587 (N.J. Sup. Ct. 1975).

[289] South Australia Draft Bill, *supra*, note 58, s. 10(6).

[290] *Ibid.*

would seem to be restricted to making a "deterrent distribution" of the residue, or returning it to the defendant.[291]

g. Conclusions and Recommendations

Given the controversy surrounding *cy-près* distributions, the Commission is of the view that the proposed *Class Actions Act* should address this issue expressly. A majority of the Commission[292] has concluded and, accordingly, recommends that, where it has proved impossible to distribute all of an aggregate award to individual class members, the court should be able to order that any residue be applied in a manner that may reasonably be expected to benefit some or all of the members of the class.[293] In arriving at this conclusion, we are influenced by the fact that, if *cy-près* distributions are not possible, the only alternatives open to a court charged with administering the residue of an aggregate award would be to order that it be returned to the defendant or be forfeited to the Province.[294] Because of the importance that we attach to the compensation of class members, we believe that, before considering these options, a court should direct its mind to whether it would be possible to benefit the class members indirectly by means of a *cy-près* distribution. Such a distribution may serve to provide at least partial compensation for those class members who would otherwise receive no redress for their injuries.

It should be noted that, under our recommendation, a *cy-près* distribution would be discretionary. In our view, the condition that the residue be distributed in a manner that may reasonably be expected to benefit the class is sufficiently flexible to permit the court to adapt *cy-près* schemes to a wide variety of circumstances. Nevertheless, it would seem desirable to incorporate in the proposed Act a supplementary provision, specifying that a *cy-près* distribution may be implemented through a conditional return of funds to the defendant to be applied in a manner beneficial to the class. We so recommend.[295] In an appropriate case, the conditions imposed might include, for example, a requirement that the defendant utilize the funds to install pollution control devices,[296] or to implement a price reduction order.

In order to resolve the controversy over the propriety of "windfalls" that has troubled American courts faced with requests for *cy-près* orders, we are of the view that the proposed *Class Actions Act* also should set out an express

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[291] For a discussion of these types of distribution scheme, see *infra*, this ch., sec. 3(c)(vi).

[292] One of the Commissioners, Mr. B.A. Percival, dissents from this recommendation. With respect to the matter of undistributed residue of any aggregate assessment, he would have made it clear that any undistributed residue should be returned to the defendant.

[293] See Draft Bill, s. 27.

[294] See *infra*, this ch., sec. 3(c)(vi).

[295] See Draft Bill, s. 27(1). Compare the Commission's recommendation regarding the unconditional return of a residue of an aggregate assessment to the defendant, discussed *infra*, this ch., sec. 3(c)(vi)d.

[296] The use of such an order is expressly suggested in the comment to §15 of the Uniform Class Actions Act, *supra*, note 148.

standard to assist the courts in determining when orders are proper that may incidentally benefit persons other than the class members who have not received their shares of the aggregate award. Accordingly, we recommend that the fact that a *cy-près* order made for the benefit of all or part of a class may incidentally benefit persons who are not members of the class, or who have already received monetary relief through some other form of distribution, should not be a bar to the making of such an order if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief will benefit thereby.[297]

Finally, we recommend that, before the court makes a *cy-près* distribution order, notice should be given to the Attorney General in order to obtain his views as to whether the proposed distribution is in the public interest.[298] It will be noted that our recommendation differs from that of the Law Reform Committee of South Australia, outlined in the preceding section of this chapter. While there is much to be said for inviting the Attorney General's views on the propriety of a *cy-près* distribution scheme, we do not believe that he should have the exclusive authority and responsibility to conceive and propose such schemes. Notice to the Attorney General will allow him to make representations concerning such matters as whether a particular price reduction scheme might give the defendant an unfair advantage over its competitors, or whether a proposed "benefit" distribution might be inappropriate.

(vi) Forfeit Distributions

It should be apparent from the preceding discussion that there will be cases where a residue of an aggregate award of monetary relief remains, but no form of *cy-près* distribution is possible. It would, therefore, seem desirable as a matter of policy to specify the options that should be available to the court in disposing of such a residue.

If the sole purpose of monetary relief in civil proceedings is to "compensate" injured parties, the only proper course of action would be to return the remainder of the fund to the defendant when both direct and indirect distributions of monetary relief to class members are unsuccessful in disposing of the entire award. If, on the other hand, it is proper to view monetary awards as an instrument of behaviour modification,[299] strong arguments can be made that the remnants of the fund should not be returned to the defendant, but rather should be forfeited to the Province as a form of unclaimed property.

The resolution of this controversy thus requires a decision regarding the goals that may properly be pursued through class actions and, indeed, through all civil litigation. Some commentators suggest that the only proper

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[297] See Draft Bill, s. 27(2).

[298] *Ibid.*, s. 29.

[299] For a discussion of the ramifications of a "behaviour modification" approach to the civil law, as opposed to one that focuses upon "conflict resolution", see Scott, *supra*, note 75, and the discussion, *supra*, ch. 4, sec. 2(a).

function of civil suits is to compensate aggrieved litigants. Others argue that civil suits also play a useful role in modifying behaviour through the prevention of unjust enrichment or the imposition of the costs of harm upon wrongdoers, which may help to modify behaviour through cost internalization.[300] In chapter 4 of this Report, the Commission examined behaviour modification in general terms in the course of its discussion of the costs and benefits of class actions;[301] we turn now to discuss the question whether the proposed *Class Actions Act* should authorize forfeit distributions for the purpose of achieving behaviour modification in appropriate cases.

a. Propriety of Behaviour Modification as a Function of Civil Awards of Monetary Relief

To set the debate concerning the propriety of behaviour modification in class actions in perspective, it is useful to examine the goals that are served by the various kinds of monetary relief in individual litigation. These functions are defined both expressly by the substantive law governing the measure of recovery for each kind of monetary relief, and by the practical impact that a judgment allowing a particular kind of relief will inevitably have upon the defendant.

(1) *Propriety of Behaviour Modification in Individual Actions*

There are three kinds of monetary relief that we shall examine. These are compensatory damages, restitution, and punitive damages.[302]

(A) *Compensatory Damages*

The measure of recovery in an ordinary civil action for damages is the amount that would compensate the plaintiff for loss suffered as a result of the defendant's tort or breach of contract.[303] While this may suggest that compensation is the only function of ordinary damage awards, at a practical level, civil damage awards also fulfil a "deterrent" function, through the desire of potential defendants to avoid substantial damage awards that may

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[300] For a description of the process of cost internalization, see *supra*, ch. 4, sec. 3(a)(iii).

[301] *Ibid.*

[302] Compensatory damages, restitution, and punitive damages are not the only forms of monetary relief available through legal proceedings. Suits may also be brought to claim money payable under the terms of a contract. In such cases, the contract itself will usually define the measure of recovery. Actions may also claim money payable under statutes, in which case the statute will provide the appropriate measure. The prospect of suits to enforce payments of this kind also may help to modify behaviour by encouraging potential defendants to perform their obligations.

[303] For a detailed discussion of compensatory damages and the limitations on the compensation principle, see Dobbs, *Handbook on the Law of Remedies: Damages — Equity — Restitution* (1973), at 135-38.

adversely affect their economic well-being.[304] The general potential of compensatory damages to punish and deter was expressly recognized by all the members of the House of Lords in *Cassell & Co. Ltd. v. Broome,*[305] which is discussed in greater detail under the topic of punitive damages.

A recovery based upon loss to a victim suffered as a result of improper conduct is also the correct measure for achieving the goal of cost internalization, if it is accepted that the losses to persons harmed by a particular business activity should be considered as part of the costs of such activity, and reflected in its prices.[306] Thus, a compensatory judgment in an individual suit automatically achieves the goals of both compensation and cost internalization, since the payment measured by the loss to the individual plaintiff operates simultaneously to compensate the victim and to impose upon the wrongdoer the cost of the harm done.

(B) *Restitution: Unjust Enrichment*

A second kind of monetary relief that may be available to an individual plaintiff in a civil action is restitution. Restitutionary claims are those in which the measure of recovery is not the plaintiff's loss, but rather the amount by which the defendant has been unjustly enriched. The purpose of restitutionary awards is generally acknowledged to be the prevention of the unjust enrichment of wrongdoers by depriving them of unjust gains.[307] Principles of unjust enrichment apply in such diverse contexts as where money is paid under a mistake of fact, where services are rendered under a mistake, where benefits are conferred as a result of various kinds of compulsion or as a result of ineffective transactions, subrogation, or waiver of tort,[308] and where benefits are acquired in breach of fiduciary relationships or of another's confidence.[309]

In many cases, the amount of the plaintiff's loss and the amount of the

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[304] Prosser, *The Law of Torts* (4th ed., 1971), at 23.

[305] [1972] A.C. 1027 (H.L.).

[306] See Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (1970), at 26-28 and 69-70. The proposition that compensatory damages in individual law suits may play a useful role in modifying behaviour and reducing accident costs by ensuring that losses suffered as a result of particular activities are imposed upon the responsible enterprises, has received express recognition in an increasing number of American courts: see, for example, *Strait v. Hale Construction Co.*, 26 Cal. App. 3d 941, 103 Cal. Rptr. 487 (1972), and *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968). In the Commonwealth context, it has also been noted with approval by Professor Fleming as a proper function of the law of torts: see Fleming, *The Law of Torts* (5th ed., 1977), at 9.

[307] For a general discussion of the differences between damage and restitutionary awards, see Dobbs, *supra*, note 303, at 136-37.

[308] A party waives a tort when he or she elects to sue in quasi-contract to recover the defendant's unjust benefit, rather than to sue in tort to recover damages. Not every tort can be waived, since there can be no restitution unless the defendant has been unjustly enriched. For a general discussion of waiver of tort, see Goff and Jones, *supra*, note 3, at 469-74.

[309] *Ibid., passim.*

defendant's enrichment will be identical, as where money has been paid under a mistake of fact, or, in the American context where, in an antitrust case, the defendant has fixed prices at an amount in excess of those that would have prevailed under competitive conditions. This will not, however, invariably be the case.

For example, there will be cases where the benefit to the defendant is substantially in excess of anything lost by the plaintiff. Such a result is particularly common in situations involving benefits acquired in breach of fiduciary relationships, where the courts have been particularly rigorous in their desire to prevent unjust enrichment.[310] In such cases, a fiduciary who has made use of his position, or trust information or property, to make a profit may be required to account for that profit even though the beneficiaries have suffered no loss as a result of the fiduciary's conduct. This result is justified by the courts' desire "to deter others from temptation". An examination of the authorities in this area leaves little doubt that, in the fiduciary context, the courts are quite consciously using monetary relief to deter improper behaviour, even where this involves giving a windfall benefit to the plaintiff.[311]

That the measure of relief associated with compensatory damages looks primarily to compensation and related benefits of cost internalization, while that associated with restitution focuses upon unjust enrichment, does not mean, however, that one form of recovery will not incidentally accomplish the benefits associated with the other. This is most evident where the plaintiff's loss and the defendant's benefit are identical, but applies in other contexts as well. A damage award that fully compensates the plaintiff may incidentally deprive the defendant of any unjust enrichment, if the benefit acquired through the misconduct in question is equal to or less than the amount of damages. Similarly, a restitutionary award that deprives the defendant of unjust benefits will incidentally compensate the plaintiff for his or her losses, if any, where these are less than or equal to the defendant's enrichment.

(C) *Punitive Damages*

By definition, punitive damages are non-compensatory. They are sums

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[310] Goff and Jones, *supra*, note 3, at 491-92.

[311] There is some conflict in the English authorities as to whether a similar approach will be taken in other situations where the defendant's unjust enrichment exceeds the plaintiff's loss, particularly in the area of waiver of tort. Compare *Phillips v. Homfray* (1883), 24 Ch. D. 439, 52 L.J. Ch. 833, where the Court of Appeal refused to allow an action against the estate of a deceased tortfeasor to recover profits made by the defendant's use of roads and passages under the land of the plaintiff to remove coal, instead of mining it in the usual and more expensive way, with the more recent case of *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.*, [1952] 2 Q.B. 246, [1952] 1 All E.R. 796 (C.A.), where the plaintiffs were allowed to recover the full market rate for the hire of equipment which the defendant had refused to return, notwithstanding that the plaintiff would not have used the equipment during the period in question.

Goff and Jones are extremely critical of restrictions on the principles of unjust enrichment underlying the law of restitution: see Goff and Jones, *supra*, note 3, at 474-78.

awarded apart from any compensatory or nominal damages because of particularly aggravated misconduct on the part of the defendant that is associated with a bad state of mind.[312]

The present law within the Commonwealth concerning punitive or exemplary damages is in a state of some confusion as a result of the decision in *Rookes v. Barnard*.[313] The House of Lords in that case restricted punitive damages to situations in which they might usefully serve to punish abuses of power by government officials, to prevent unjust enrichment of the defendant where the defendant has acted on the basis that the benefits to be made from his misconduct will outweigh any losses that the plaintiff may be able to recover as compensatory damages, or where expressly authorized by statute.

In *Rookes v. Barnard*, Lord Devlin suggested that punitive damages represented an anomalous confusion of the civil and criminal functions of the law, but he was obliged to concede a continuing role for such damages for two reasons.[314] The first reason was that precedents in favour of exemplary damages as part of the civil law were too strong to permit a complete eradication of the "anomaly". The second was that Lord Devlin was prepared to admit "that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal".[315]

Lord Devlin's first category in which exemplary damages were to be preserved – that is, arbitrary or oppressive action by government servants – is of limited interest for our purposes. Of much greater interest is Lord Devlin's recognition of the need for punitive damages as a means of deterring misconduct through the prevention of unjust enrichment:[316]

> Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.
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> . . . .
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> Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object – perhaps some property which he covets – which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.
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> . . . .

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[312] Dobbs, *supra*, note 303, at 204-06.

[313] [1964] A.C. 1129, [1964] 1 All E.R. 367 (H.L.) (subsequent references are to [1964] A.C.).

[314] *Ibid.*, at 1221 and 1225-27.

[315] *Ibid.*, at 1226.

[316] *Ibid.*, at 1226, 1227, and 1228.

> In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum.

It is of interest to note that Lord Devlin expressly recognized that even compensatory damages play a role in deterring misconduct.

Prior to *Rookes v. Barnard*, the law relating to punitive damages in Ontario permitted such a recovery where "a defendant's conduct could be characterized as 'high-handed', 'insolent', 'vindictive', 'malicious', 'showing a contempt of the plaintiff's right' or 'disregarding every principle which actuates the conduct of gentlemen' ".[317] It would seem that the decision of the House of Lords in *Rookes v. Barnard* has not resulted in any change in the law of this jurisdiction relating to punitive damages. Courts in Ontario, in some other provinces, and in other parts of the Commonwealth have refused to follow the House of Lords decision.[318] Indeed, the limitations established by *Rookes v. Barnard* did not gain uniform acceptance initially even in England. In *Broome v. Cassell & Co. Ltd.*,[319] the Court of Appeal unanimously refused to follow *Rookes v. Barnard* on the ground that it had been decided *per incuriam*, and that Lord Devlin's designated categories of conduct for which punitive damages were permitted were illogical, arbitrary, and restrictive.[320]

On appeal to the House of Lords, the majority of the law lords in *Cassell*

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[317] Catzman, "Exemplary Damages: The Decline, Fall and Resurrection of Rookes v. Barnard", in *Special Lectures of the Law Society of Upper Canada: New Developments in the Law of Torts* (1973) 41. In reported decisions, Ontario courts granted or upheld such awards in cases involving assault and unlawful arrest, trespass to ships, trespass to land, conversion of goods, defamation and conspiracy to defraud and deceit.

[318] See McGregor, *supra*, note 3, at 234-37, and Fridman, "Punitive Damages in Tort" (1970), 48 Can. B. Rev. 373, at 388-95, for a detailed list of cases and an analysis of their significance. Courts in Australia, Saskatchewan, Manitoba, New Brunswick, and Ontario have declined to follow *Rookes*, while the British Columbia authorities are divided. The question of punitive damages came before the Supreme Court of Canada in *McElroy v. Cowper-Smith and Woodman*, [1967] S.C.R. 425, 62 D.L.R. (2d) 65. The majority disposed of the case on other grounds, which made it unnecessary to consider the merits of Lord Devlin's position in *Rookes v. Barnard*. Spence J., in dissent, did deal with this issue. After holding that the particular case fell, in any event, within Lord Devlin's second "unjust enrichment" category, he went on to express the view that in Canada the jurisdiction to award punitive damages was not as limited as that in *Rookes v. Barnard*, so that the making of a profit was not a prerequisite for such an award: *ibid.*, at 432-33. A similar position was taken by the Ontario Court of Appeal in *Gouzenko v. LeFolii*, [1967] 2 O.R. 262, 63 D.L.R. (2d) 217, at 223, where Kelly J.A. succinctly remarked that "whatever may be the law in England as enunciated in . . . *Rookes v. Barnard* . . . it is not the law of this Province".

[319] [1971] 2 Q.B. 354, [1971] 2 W.L.R. 853 (C.A.) (subsequent references are to [1971] 2 W.L.R.).

[320] In particular, the Court of Appeal objected to the denial of any right to recover punitive damages against private "bullies", when such a right was given against government officials: *ibid.*, at 870, 875, and 885.

& Co. Ltd. v. Broome[321] ruled that *Rookes* was not decided *per incuriam*, but was binding upon the courts of England, notwithstanding the conflicting Commonwealth authorities. However, all members of the House of Lords in *Broome* expressly lent their support to the proposition that compensatory damages serve a deterrent function, and that punitive damages should be awarded only if the compensatory award is not sufficient to achieve this goal.[322] The case also reemphasized the importance of punitive damages as a means of preventing unjust enrichment of defendants that might otherwise take place because of economic barriers to litigation and discrepancies between the defendant's gain and the plaintiff's loss.[323]

It therefore seems clear that even the House of Lords, which has adopted the most restrictive approach to punitive damages of any Commonwealth court, is prepared to recognize that civil damages, whether compensatory or punitive, have a legitimate role to play in deterring improper behaviour, and that the prevention of wrongdoing motivated by a desire for unjust enrichment is a sufficiently important goal to justify an award of damages over and above any compensatory amount.

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[321] *Supra*, note 305.

[322] *Ibid.*, Lord Hailsham, at 1078-79 and 1082; Lord Reid, at 1089; Lord Morris of Borth-y-Gest, at 1095-96; Viscount Dilhorne, at 1104; Lord Wilberforce, at 1114; Lord Diplock, at 1121-22 and 1126; and Lord Kilbrandon, at 1133. In the words of Lord Diplock (at 1126):

> My Lords, the major clarification of legal reasoning to be found in the expository part of Lord Devlin's speech in *Rookes v. Barnard* was the recognition, first, that the award of a single sum of money as damages for tort, while it must always perform the function of giving to the plaintiff what he deserves to receive to compensate him fully for the harm done to him by the defendant, may in appropriate cases also perform the quite different function of fining the defendant what he deserves to pay by way of punishment; and secondly, that even in those appropriate cases, it is only if what the defendant deserves to pay as punishment exceeds what the plaintiff deserves to receive as compensation, that the plaintiff can be also awarded the amount of the excess. This is a windfall which he receives because the case happens to be one in which exemplary damages may be awarded.

[323] *Ibid.*, at 1079, *per* Lord Hailsham:

> It is true, of course, . . . that the mere fact that a tort, and particularly a libel, is committed in the course of a business carried on for profit is not sufficient to bring a case within the second category.
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> . . . .
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> What is necessary in addition is (i) knowledge that what is proposed to be done is against the law or a reckless disregard whether what is proposed to be done is illegal or legal, and (ii) a decision to carry on doing it because the prospects of material advantage outweigh the prospects of material loss. It is not necessary that the defendant calculates that the plaintiff's damages if he sues to judgment will be smaller than the defendant's profit. This is simply one example of the principle. The defendant may calculate that the plaintiff will not sue at all because he has not the money (I suppose the plaintiff in a contested libel action like the present must be prepared nowadays to put at least £30,000 at some risk), or because he may be physically or otherwise intimidated. What is necessary is that the tortious act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical, penalty.

(2) *Propriety of Behaviour Modification in Class Actions*

As indicated above, if one views behaviour modification as a legitimate function of class actions, it may be argued that the residue of any aggregate award should not be returned to the defendant, but rather should be forfeited to the Crown. Critics of such a role for class actions raise arguments against deterrent distributions that are very similar to those directed against the imposition of punitive damages in individual actions.[324] Essentially, it is argued that the utilization of either punitive damages or a deterrent distribution of the residue of an aggregate award usurps the function of the criminal law with its higher standard of proof. Such an argument is not persuasive, however.

There are certain significant differences between forfeiture of the residue of an aggregate award and the imposition of a penalty in criminal proceedings. First, a forfeit distribution does not carry the stigma of a criminal conviction, nor the possibility of a jail sentence. Secondly, outer limits to the size of an aggregate award and any residue that may ultimately be forfeited are established by the harm done by the defendant, as governed by substantive rules of civil law. The defendant's ultimate liability can be no greater than the amount of his liability if all class members had come forward to assert their claims. By contrast, neither the criminal law nor, indeed, the law of punitive damages requires that there be any exact relationship between the monetary value of the injury and the size of the fine or punitive award.

Moreover, there is a wide range of civil causes of action in which a criminal penalty neither exists nor would be appropriate. No one would suggest that it would be appropriate to impose criminal sanctions for all negligent acts or breaches of contract, for example. If incentives for modification of inappropriate conduct are to be provided in such areas, it must be through the operation of civil suits, in either individual or class form.

It has been noted earlier that all civil cases play a role in achieving behaviour modification by achieving cost internalization or the prevention of unjust enrichment. Class actions differ from individual suits only in their potential to enforce claims that are smaller in size than the individually recoverable claims that can support individual litigation, and to achieve recoveries without the active participation of all persons who are entitled to relief.

In individual suits, the claimant will always be before the court and in a position to claim any amount successfully recovered. The same state of affairs will exist in those class actions where ultimate recovery is dependent upon the presentation of individual evidence by class members. In such cases, behaviour modification and the provision of relief to individuals will always co-exist.

By contrast, where an aggregate assessment is feasible, it will be possible

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[324] Perhaps the best summary of the opposing arguments may be found in Fridman, *supra*, note 318.

to establish the defendant's total liability, which corresponds to the appropriate measure for cost internalization or prevention of unjust enrichment, without having the individuals entitled to the amounts recovered before the court. If it subsequently proves impossible to locate all class members, or if they do not come forward, it will not be possible to achieve the "individual redress" functions of the class action; nevertheless, achievement of "deterrence" may still be feasible if the residue of the aggregate award is forfeited to the Crown instead of being returned to the defendant.

In other words, behaviour modification is an inescapable function of civil monetary awards, but is ordinarily linked to the achievement of monetary redress for particular individuals. The key question in the decision whether to adopt a provision permitting forfeit distributions is not, therefore, whether "deterrence" is a proper function of the civil law, but whether this objective is sufficiently important to stand alone, without any ties to individual redress.[325]

b. Mass Wrongs and Deterrence: American Case Law

A number of American judges in class action cases have discussed the general value of class actions in deterring unlawful conduct.[326] It is uncertain, however, in light of the apparent rejection of aggregate awards for monetary relief by the Second Circuit Court of Appeals in *Eisen III*,[327] whether United States federal courts would be prepared to permit deterrent distributions to government bodies, as opposed to recognizing the incidental deterrent effect of compensatory distributions to class members. As noted earlier, a deterrent distribution is only possible where an aggregate award has been made and a residue remains after compensatory forms of distribution have been completed. The Second Circuit Court of Appeal's apparent hostility in *Eisen III* to aggregate calculation of damages, therefore, has posed a substantial barrier to deterrent distributions.

The *Eisen III* case, however, has not prevented a wide range of commentators from advocating a "deterrent" role for class actions.[328] Some have gone so far as to suggest that deterrence should be the primary purpose of monetary awards in class actions.[329] Moreover, the growing receptivity of

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[325] This particular problem is unique to mass litigation involving mass wrongs, since even punitive damages are paid to a private individual, although it should be noted that such payments constitute a private "windfall" that has itself been the subject of criticism.

[326] See, for example, *Vasquez v. Superior Court of San Joaquin Cty.*, 4 Cal. 3d 800, 484 P.2d 964 (S.C. 1971), at 968-69; *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968), at 487; *Amalgamated Workers Union of the Virgin Islands v. Hess Oil Virgin Island Corp.*, 478 F.2d 540 (3d Cir. 1973), at 543; and *Reiter v. Sonotone Corp.*, 99 S. Ct. 2326 (1979), at 2337.

[327] *Supra*, note 83.

[328] See, for example, Wright and Miller, *supra*, note 72, §1784, at 125.

[329] See Gould, *supra*, note 75, at 15, 21, 34, 48, and 51-52. See, also, Sumnick, "California Corporations Code Section 25530(b): Government Agency Suit versus the Private Class Action" (1975), 27 Hastings L. J. 265, at 287-89.

American courts to the use of common proof of damages, in at least some cases,[330] may well place these courts in a position where this question must be resolved. Indeed, the plaintiff in *Van Gemert v. The Boeing Company*, with the support of the state Attorney General, was requesting that the unclaimed residue of the aggregate award should escheat to the State of New York.[331] Both the Second Circuit Court of Appeals and the United States Supreme Court expressly reserved judgment on this issue.[332]

Despite the lack of conclusive class action precedent, there are a few examples of nonclass action cases where courts have had to grapple with the disposition of the residue of a common award of monetary relief resulting from a mass wrong.

In the earliest such case, *Illinois Bell Telephone Co. v. Slattery*,[333] a telephone company had itself administered the refund of certain overcharges that it had made to its customers. The total amount of the overcharge, with interest, was $18,798,980.14. At the expiry of the three year distribution period, the telephone company reported that $1,688,295.68 remained undistributed. At this point, the telephone company filed a petition requesting the Court to make a ruling that the unclaimed sums were its property. In reply, the Illinois Attorney General filed a petition arguing that the unclaimed refunds were ownerless and, therefore, the property of the State of Illinois in its sovereign right as the owner of all property having no owner. The Court of Appeals for the Seventh Circuit rejected the Attorney General's contention for two reasons.[334] First, it was unclear whether, in the absence of a statutory provision, the common law doctrine of *bona vacantia* applied in Illinois, leaving the court to determine whether escheat was possible. Secondly, no true "common fund" had been created in which class members could acquire property rights, since the refund process had been administered by the defendant without the creation of a separate fund. The Court concluded that, under these circumstances, the class members merely had debt claims against the defendant, which expired with the limitation period and, accordingly, there was nothing to escheat at common law.

The Court's reasoning in the *Illinois Bell Telephone Co.* case raises the issue whether the Court would have come to a different conclusion had the "fund" been paid into court as a result of a judgment for the specific amount, as would be true in the case of most aggregate assessments. In such a case, it could be argued that the claimants would have had existing property rights in the fund in court,[335] and not mere debt claims against the defendant that would be terminated by the expiry of the limitation period for collection.

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[330] See, for example, the cases considered *supra*, this ch., sec. 3(b)(i).

[331] *Van Gemert IV, supra*, note 118, at 754, *n.* 4.

[332] *Van Gemert IIIA, supra*, note 118, at 737; *Van Gemert IIIB, supra*, note 118, at 440, *n.* 17; and *Van Gemert IV, supra*, note 118, at 751, *n.* 8.

[333] 102 F.2d 58 (7th Cir. 1939).

[334] *Ibid.*, at 67-68.

[335] See *Van Gemert II, supra*, note 118, at 751.

An answer to this question may be found in the more recent case of *Hansen v. United States*.[336] In 1952, the United States obtained a judgment for the benefit of certain tenants under rent control legislation, which did not contain a provision expressly determining how any unclaimed residue was to be applied. Part of the award was not claimed and, as an interim measure, the unclaimed residue was paid into a general trust account maintained by the United States government for the preservation of "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown". In 1965, the Court of Appeals for the Eighth Circuit in *Hansen* was faced with an application by the landlord for the return of the unclaimed residue of the fund created in 1952. The Court rejected the landlord's application,[337] on the ground that a judgment debtor who had paid his judgment was not the rightful owner of the unclaimed portion of the judgment deposited in the trust account, which instead became the property of the tenants who were entitled to the amounts thus paid. The Court cited with approval an earlier case[338] indicating that unclaimed moneys paid into a judgment fund must remain there until they are claimed by the persons having title thereto, or until they escheat.

A similar result took place in *Hodgson v. Wheaton Glass Co.*[339] In that case, which was brought under section 17 of the Fair Labour Standards Act of 1938,[340] the Court of Appeals for the Third Circuit refused to return an unclaimed fund, even though section 17 contained no express provision for ultimate distribution of any residue. Instead, the Court ruled that the money was to remain on deposit with the United States government until an escheat claim was asserted by a state.[341] A number of courts have reached a similar result in a variety of fair labour standards cases.[342]

Thus, American courts have been prepared to hold, in nonclass action cases, that an unclaimed residue of an award for the benefit of persons not before the court is the property of these persons and not that of the defendant, and that such a residue will ultimately escheat or be forfeited if it remains unclaimed.

c. Express Authorization of Forfeit Distributions by Class Action Mechanisms

Many of the more recent class action mechanisms that have been proposed or adopted incorporate provisions relating to forfeit distribu-

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[336] 340 F.2d 142 (8th Cir. 1965).

[337] *Ibid.*, at 143-45.

[338] *Pennsylvania R.R. Co. v. United States*, 98 F.2d 893 (3d Cir. 1938), at 894.

[339] 446 F.2d 527 (3d Cir. 1971).

[340] 29 U.S.C. §217.

[341] *Supra*, note 339, at 535-36.

[342] See *Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975); *Hodgson v. A-1 Ambulance Service, Inc.*, 455 F.2d 372 (8th Cir. 1972); and *Wirtz v. Jones*, 340 F.2d 901 (5th Cir. 1965).

tions.[343] These "behaviour modification" mechanisms may be divided into two categories, depending upon whether a deterrent distribution is mandatory in all circumstances, or whether the judge retains an option to return the residue to the defendant. The Uniform Class Actions Act and the South Australia Draft Bill for a Class Actions Act give discretion to the judge to decide between the two forms of disposition. Bill H.R. 5103, put forth by the Office for Improvements in the Administration of Justice of the United States Department of Justice, the "*parens patriae*" legislation, and the first incarnation of the Canadian federal government's Competition Bill, Bill C-42, would all make a deterrent distribution mandatory in the circumstances to which they apply.

Turning first to the latter group of precedents, it should be noted that O.I.A.J. Bill H.R. 5103 would have replaced private class actions under Rule 23(b)(3) with a "public action" for claims under $300.[344] The primary purpose of the public action was expressly stated to be the deterrence of illegal conduct and the prevention of unjust enrichment.[345] Despite their "public" nature, the initiation and conduct of such suits could still be carried on, under certain conditions,[346] by private persons, referred to as "relators", and distribution of proceeds to individuals who had been injured would still be attempted. However, if such a distribution could not be accomplished, or if a residue was left, the balance was to go into the federal Treasury.[347] The Treasury, in turn, was to pay these amounts into funds established by the Department of Justice or the government agency that conducted the particular public action or that was authorized to initiate the public action, or to the state that initiated the public action in question.[348] These payments were to be used, in cases where a public class action had been assumed by the Attorney General, a state, or a government agency, to pay the attorneys' fees and costs of a relator, or of private counsel retained to prosecute the public action.[349] Payments not so applied within three years of their deposit could be used by the Department of Justice or other government agency, or by the state, for the enforcement of any statute for which it was responsible.[350]

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[343] U.C.A.A., *supra*, note 148, §15(c)(5), (6), and (8); South Australia Draft Bill, *supra*, note 58, s. 10(6); O.I.A.J. Bill H.R. 5103, *supra*, note 150, §3005(c); Antitrust Improvements Act, *supra*, note 147, enacting 15 U.S.C. §15C; and Bill C-42, *supra*, note 58, s. 39.15(2).

The Quebec class actions legislation may also authorize deterrent distributions, but this is uncertain since it, in essence, authorizes the court to dispose of the fund as it thinks fit: see C.C.P., *supra*, note 146, art. 1036.

[344] O.I.A.J. Bill H.R. 5103, *supra*, note 150, §3001.

[345] United States Department of Justice, Office for Improvements in the Administration of Justice, *S. 3475 — Bill Commentary: Proposed Revisions in Federal Class Damage Procedures* (1978), at 9-10.

[346] O.I.A.J. Bill H.R. 5103, *supra*, note 150, §§3001(c)(3) and 3002.

[347] *Ibid.*, §3005.

[348] *Ibid.*, §3005(c)(1).

[349] *Ibid.*, §§3003(b) and 3005(c)(2).

[350] *Ibid.*, §3005(c)(2).

The antitrust *parens patriae* damage mechanism allows a state Attorney General to sue to recover damages for certain antitrust injuries suffered by residents of his state.[351] Distribution of damages to injured individuals will be attempted, but any balance remaining will go automatically into the state's general revenues.[352] The House of Representatives Committee that proposed the *parens patriae* amendments justified them in terms of the need for deterrence, and indicated its belief that "a defendant who has committed an antitrust violation has no right, constitutional or otherwise, to the retention of one penny of measurable illegal overcharges or other fruits of the violation".[353]

Bill C-42, contained a provision allowing the "Competition Policy Advocate" to bring a "substitute action" where the court refused to certify a class action solely because there was not a sufficient number of members of the class likely to have suffered a significant quantum of loss; any amount recovered by the Competition Policy Advocate was to be paid into the Consolidated Revenue Fund.[354] No individual distribution procedure was required, presumably because of the prerequisite that class members not have suffered a significant quantum of loss; accordingly, deterrence was the only applicable policy consideration. The provision for substitute actions was deleted, however, from the subsequent version of the Competition Bill.[355]

The South Australia Draft Bill, by contrast, would give the court a discretion either to return the residue to the defendant or to distribute it to a fund, without specifying any criteria to assist the court in making this decision. This fund is intended to provide financial aid to class plaintiffs, to compensate class members for defalcations of representative plaintiffs and their agents, and to aid defendants with certain of their legal costs.[356] The Attorney General may propose that the residue be paid to the fund, but his recommendation is not a precondition to such an order, as in the case of *cy-près* schemes.[357] These provisions are presumably applicable to all kinds of class action.

The Uniform Class Actions Act[358] also gives the court a discretion with respect to whether the residue of an aggregate award of damages should be returned to the defendant or applied for other purposes. Section 15(c)(6) contains a list of specific factors that the court must take into account in making its decision, including the likelihood of unjust enrichment, the wilfulness of the defendant's conduct, the impact of the relief granted, the

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[351] Antitrust Improvements Act, *supra*, note 147, enacting 15 U.S.C. §15C.

[352] *Ibid.*, §15e.

[353] House Comm. on the Judiciary, *Report to Accompany H.R. 8532*, reprinted in "The Antitrust Parens Patriae Act" (1975), 4 C.A.R. 292, at 301.

[354] Bill C-42, *supra*, note 58, ss. 39.14 and 39.15.

[355] *An Act to Amend the Combines Investigation Act*, Bill C-13, 1977 (30th Parl. 3d Sess.) (hereinafter referred to as "Bill C-13").

[356] South Australia Draft Bill, *supra*, note 58, s. 10(7).

[357] *Ibid.*, s. 10(6).

[358] U.C.A.A., *supra*, note 148.

pendency of other claims against the defendant, any criminal sanction imposed on the defendant, and the loss suffered by the plaintiff class. If a "deterrent" award is to be made, the money is to be paid to the affected states, rather than into a costs fund.[359] The Attorney General of an affected state is entitled to notice and an opportunity to bring a motion for payment to that state.[360]

d. Conclusions and Recommendations

Although the American case law suggests that the unclaimed residue of funds resulting from class and nonclass litigation might well escheat, even in the absence of express legislation on this point, there is much to be said for expressly resolving this question. An express statutory provision has a potential for flexibility that is not present if this matter is left to the common law and escheat statutes of general application.[361] Although the law in this area in the United States remains uncertain, presumably it dictates an all or nothing result: either the residue belongs to the class members and will escheat, or it belongs to the defendant and must therefore be returned to him. As a matter of policy, however, considerations of equity and behaviour modification may interact in a manner that suggests that the fund should be forfeited in some cases and should be returned to the defendant in others.

In an earlier chapter of this Report, the Commission indicated that the potential of class actions to achieve a greater measure of behaviour modification than was feasible through individual suits was an important benefit of this procedure. Indeed, the "deterrent" potential of class actions was one factor in the Commission's decision to recommend the adoption of an expanded class action procedure for Ontario.[362]

The Commission does not believe that the potential of class actions to encourage appropriate behaviour or to discourage inappropriate conduct should be limited by the problems inherent in identifying class members and distributing their shares of monetary relief to them. For this reason, the Commission is of the view that a provision should be adopted expressly authorizing forfeit distributions where an aggregate award cannot be applied for the immediate benefit of class members.

The Commission does not believe, however, that such distributions should be mandatory in all cases. The need for behaviour modification, and the equities in favour of allowing an unconditional return of the residue to the defendant, may vary substantially from one case to another. For example, it might be manifestly unjust to return the balance to a defendant who has perpetrated a consumer fraud; on the other hand, there may be circumstances where no direct deterrent purpose could be served, as in the case of a cause of action based upon strict liability, where the injury could not possibly have

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[359] *Ibid.*, §15(c)(8).

[360] *Ibid.*

[361] See, for example, the *Escheats Act*, R.S.O. 1980, c. 142.

[362] See *supra*, ch. 4, sec. 3(a)(iii).

been foreseen, although it might be argued that, in such a case, there is still a role for indirect behaviour modification through cost internalization. The Commission believes that Ontario courts should be given a broad and flexible discretion to choose between a forfeit distribution and the unconditional return of the residue to the defendant, depending on the facts of the particular case.[363] Accordingly, a majority of the Commission[364] recommends that the proposed *Class Actions Act* should authorize the court to order that the residue of any aggregate award not distributed to or for the benefit of class members be forfeited to the Crown or returned unconditionally to the defendant, as the court considers proper.[365]

Finally, it would seem desirable that, as in the case of *cy-près* distributions, the Attorney General should receive notice of any proposed forfeit distribution or any unconditional return of funds to the defendant. The Attorney General is ideally suited to present to the court the public policy considerations that weigh for or against a behaviour modification distribution in a particular area of substantive law or in a given class suit. We so recommend.[366]

4. INDIVIDUAL ASSESSMENT OF MONETARY RELIEF

Although aggregate awards of monetary relief are likely to result in substantial economies for both courts and class members, and should be utilized in class actions whenever evidence sufficient to support such an award is available, even the strongest proponents of aggregate awards acknowledge that there will be many cases when the underlying nature of the particular suit simply will not lend itself to such an award.[367]

As noted earlier,[368] many of the problems that Ontario courts have experienced with class actions requiring individual assessment of monetary relief reflect the lack of any express provision in Rule 75 authorizing proceedings to resolve individual issues, or giving guidelines as to how such

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[363] It should be emphasized, however, that in conferring this discretion on the courts, the Commission does not wish to suggest that forfeit distributions should be possible only where the defendant's conduct is criminal or wilful. The need for incentives toward behaviour modification may exist with respect to many forms of negligent conduct. Moreover, the need for cost internalization is one of the factors that may underlie the adoption even of a regime of strict liability. The courts' discretion with respect to forfeit distributions should not be artificially constrained by the form of the cause of action asserted through the class action. Indeed, it should reflect a careful balancing, on the facts of the particular case, of the interest of society and the class members in behaviour modification, and any equities in favour of the defendant.

[364] As in the case of *cy-près* distributions, *supra*, note 292, one of the Commissioners, Mr. B.A. Percival, is opposed to forfeit distributions. In his view, any residue should be returned to the defendant.

[365] See Draft Bill, s. 28.

[366] *Ibid.*, s. 29.

[367] See *supra*, this ch., sec. 3(b)(iv).

[368] See *supra*, this ch., sec. 2(a).

proceedings are to be administered. In the absence of an express provision of this kind, Ontario courts have been reluctant to administer class actions involving individual assessments, despite the fact that the equitable action for an accounting provides a precedent for such hearings.

It would therefore seem essential to incorporate in the proposed *Class Actions Act* a provision providing guidance to the courts in this area. The power of the courts to order and administer proceedings designed to resolve individual issues should not, however, be restricted to cases where individual assessments of monetary relief are required. There are a variety of other issues that courts may have to resolve on an individual basis before the entitlement of class members to relief can be determined. For example, particular cases may raise issues of reliance, as in *Naken v. General Motors of Canada Ltd.*,[369] or give rise to the possibility of claims of contributory negligence.

The Commission does not believe that individual issues relating to monetary relief in class actions are sufficiently different from other individual issues that a separate "individual assessment" provision is required. For this reason, we shall discuss individual monetary issues in the next chapter, where they can be considered in conjunction with other problems of individual proof, in an attempt to formulate generally applicable "individual questions" recommendations.

The Commission wishes to reemphasize, however, that individual proceedings relating to the assessment of monetary relief should be required only where an aggregate assessment of monetary relief is not feasible or where the amount of monetary relief to which class members are entitled cannot be established by common evidence.[370] To insist upon individual proof when acceptable common evidence is available would place unnecessary burdens on both courts and class members. Any "individual questions" provision therefore should be made expressly subject to the aggregate assessment provision recommended earlier in this chapter.[371]

5. ECONOMIC IMPACT OF CLASS ACTION DAMAGE AWARDS UPON A COMMUNITY: DEFERRED AND INSTALMENT PAYMENTS

There is one final issue that should be addressed in the present chapter. Class action critics have expressed concern that large damage awards, whether they result from an aggregate assessment or from a series of individual assessments, might bankrupt a business whose activities are beneficial to the community. An example might be a factory that provides

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[369] *Supra*, note 39.

[370] For example, in *Naken v. General Motors of Canada Ltd.*, *supra*, note 39, the need for individual proceedings to resolve the issue of reliance would prevent a court from making an aggregate assessment under s. 22 of the Draft Bill. Nevertheless, there might well be evidence to establish as a common question the amount of monetary relief to which each class member is entitled. In such a case, resort should not be had to individual proceedings for the purpose of assessing monetary relief.

[371] See Draft Bill, s. 30.

most of the employment in a community. If such a business produced a generically defective product that injured a large number of people, a class action damage award might have a significant impact not only on the defendant, but on members of the community as well.

The Commission has previously rejected the "bankruptcy" argument as a basis for refusing to adopt an expanded class action procedure for Ontario.[372] This leaves open, however, the question whether it may be appropriate to incorporate some provision giving a court discretion to permit adjustment in the terms of payment of a class action judgment, once liability has been determined, where this may be in the best interests of the class members or the community.

There have been few cases in which American courts have grappled directly with problems of this kind. The most informative case is not a "private" class action, but rather a suit by the United States Secretary of Labour under the Fair Labour Standards Act to enforce the rights of employees to monetary relief under that statute. In *Hodgson v. A-1 Ambulance Service, Inc.*,[373] the defendant resisted the imposition of a contempt order requiring the payment of certain amounts precisely on the basis of the disruptive effect that such an order would have upon the defendant and the community. It would have deprived the City of Little Rock of ambulance service, would have caused employees to lose their jobs, and would have resulted in the denial of any recourse to those with back pay claims. The Eighth Circuit Court of Appeals rejected the suggestion that the defendant should be relieved of its liability to make payment and suggested, instead, that any measures to deal with this problem should involve a supplemental order allowing "reasonable terms of time and manner of payment".[374]

This position seems sound in principle. Those harmed by a defendant's conduct should not have their legal entitlement to monetary relief altered merely because the defendant has injured a large number of persons who seek redress in class form. In our view, a reasonable balance is struck if enforcement of such rights is postponed for a time. This may be effected by several devices, such as an order staying enforcement of a judgment, or permitting payment by instalments, which would nevertheless leave the judgment itself, and the rights of the class members, intact and enforceable if the defendant's position improved.

Those class action statutes that have attempted to deal with the bankruptcy problem have, indeed, done so through devices such as instalment payments or stays, as opposed to refusal of class status to class actions that are otherwise appropriate. Thus, section 907(5) of the New York Civil Practice Law and Rules, dealing with orders in the conduct of class actions, specifies that in such actions the court may make appropriate orders "directing that a money judgment favorable to the class be paid either in one sum, whether forthwith or within such period as the court may fix, or in such

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[372] See *supra*, ch. 4, sec. 3(b)(iv).

[373] *Supra*, note 342.

[374] *Ibid.*, at 375.

installments as the court may specify". Section 15(a) of the Uniform Class Actions Act[375] provides that "[t]he court may award any form of relief consistent with the certification order to which the party in whose favor it is rendered is entitled including equitable, declaratory, monetary or other relief to individual members of the class or the class in a lump sum or installments". Section 15(c)(4) of this Act specifies that "[t]he court shall supervise, and may grant or stay the whole or any portion of, the execution of the judgment and the collection and distribution of funds to the members of the class as their interests warrant".

The Commission believes that the statutory provisions set out above reflect the correct approach to the issue of the possible adverse effects of a class action judgment upon the economic well-being of the community. Judgment should be given for the monetary relief to which the class is entitled according to normal standards of substantive law, in the form of a single judgment based upon an aggregate award, or in the form of a series of judgments based upon the determination of individual proceedings. The court should be given the power, however, to order that the amount or amounts awarded be paid either in a lump sum, whether forthwith or within such period as the court may fix, or in instalments, and we so recommend.[376] We further recommend that the court should be able to stay, for a reasonable period, the execution or distribution of the whole or any part of a class action judgment.[377] Any decision relieving the defendant from the ordinary enforcement of an adverse judgment should be based upon a balancing of the legitimate interests of members of the community, such as employees or business people in one-industry towns, against those of the class members. In our view, the interest of the defendant is not relevant to this determination. In the absence of a disruptive effect upon members of the community, it is difficult to see why a defendant who has been held liable in a class suit should have any greater right to relief than defendants who are subject to judgments in individual actions.

Such factors as the nature of the harm done to the class members, and the interest of the class members in immediate payment or distribution, might weigh against postponement of payment through instalments or a stay of execution if, for example, the class members had suffered physical injuries that required ongoing treatment, or if they were in urgent need of funds for some other reason. Similarly, postponement might be inadvisable if it would render more difficult the identification of class members and the distribution of monetary relief to them. This might be the case if the delay were sufficiently great that class members were likely to die, move, or otherwise become unavailable. On the other hand, it is possible that a delay in payment might increase the likelihood that class members would achieve full recovery upon their claims. This reflects the fact that the defendant's financial capabilities may be greater if payments are spread over time.[378]

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[375] U.C.A.A., *supra*, note 148.

[376] See Draft Bill, s. 33(1).

[377] *Ibid.*, s. 33(2).

[378] For an example of a case where the class representative was aware of this possibility and took it into account in negotiating a settlement, see *In Re Montgomery County Real Estate Antitrust Litigation*, 83 F.R.D. 305 (D. Md. 1979).

In order to provide reasonable protection for the class members where the court delays immediate payment of a class action judgment, the court should be given a broad power to make any order for a stay of execution or for payment by instalments subject to conditions that would protect the interests of the class members. For example, the court might wish to require that the defendant provide security designed to protect the rights of the class members to future payments.[379] Accordingly, we recommend that the proposed *Class Actions Act* should empower a court to impose such terms and conditions it considers appropriate in ordering how a class action judgment should be paid or in granting a stay of the execution or distribution of a class action judgment.[380]

Finally, the proposed Ontario *Class Actions Act* should give the courts a broad discretion to supervise the execution of any judgment against the defendant, and the distribution of any resulting funds. Such a provision would permit the court to specify which of the defendant's assets are available for execution. It would also permit the court to specify how any instalment payments are to be applied to satisfy the judgments of the various class members, whether *pro rata* or in a manner designed to take account of differences in their needs. For example, the court might specify that persons who have suffered physical injuries requiring ongoing medical treatment should be paid in preference to those who have suffered merely economic loss. Accordingly, the Commission recommends that a court should be required to supervise the execution and distribution of a class action judgment.[381]

Recommendations

The Commission makes the following recommendations:

1. The proposed *Class Actions Act* should provide expressly that certification of a class action should not be refused merely because the relief claimed includes a claim for damages that will require individual assessment in proceedings involving the defendant or because the relief claimed arises out of or relates to separate contracts between members of the class and the defendant.

2. The proposed *Class Actions Act* should authorize expressly the use of aggregate assessment of monetary relief and should specify the standard of proof that should be required before an aggregate assessment may be made. The Act should provide that the court should be required to determine the aggregate amount of the defendant's liability and to give judgment for that amount where,

   (a) monetary relief is claimed on behalf of the members of a class;

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[379] See Note, "The Impact of Class Actions on Rule 10b-5" (1971), 38 U. Chi. L. Rev. 337, at 370.

[380] See Draft Bill, s. 33(1) and (2).

[381] *Ibid.*, s. 33(2).

(b) no questions of fact or law other than the assessment of monetary relief remain to be determined in order to establish the defendant's liability to some or all class members; and

(c) the total amount of the defendant's liability, or part thereof, can be assessed with the same degree of accuracy as in an ordinary action without proof by individual class members.

3. Where monetary relief is assessed in the aggregate and judgment is given, the court should order the defendant to pay the aggregate award into court, except where, in accordance with Recommendation 4(1)(a), the court orders a direct distribution of the aggregate award of monetary relief by the defendant.

4. (1) Where there has been an aggregate award of monetary relief and the identity of any class members and the amount of monetary relief to which each is entitled can be determined from records in the possession, custody, or control of the defendant,

(a) the court should be able, but not required, to order the defendant to make such determinations and to distribute the amounts so determined directly by any means authorized by the court; and

(b) the court should be required, if it does not order a defendant-administered direct distribution under Recommendation 4(1)(a), to determine the amount to which each class member is entitled and to order the amounts so determined to be distributed directly by any means it authorizes.

(2) Direct distribution by the court under Recommendation 4(1)(b) should not be restricted to cases where the identities of, and amounts owing to, class members can be determined from the defendant's records, but should be available in all cases where such identities and amounts can be determined without requiring evidence from each class member.

5. (1) Where the court does not order a direct distribution under Recommendation 4 or an average distribution under Recommendation 6, class members should be afforded a reasonable opportunity to claim their shares of an aggregate award.

(2) In order to minimize the burden upon class members, and because the maximum amount of the defendant's aggregate liability has been established in formal adversarial proceedings, informal "administrative", rather than formal judicial, procedures should be adopted for the purpose of establishing the claims of class members to a share of the aggregate award. Accordingly, the proposed *Class Actions Act* should authorize the courts to adopt such procedures as will minimize the burden upon members of the class, including the use of standardized proof of claim forms, the reception of affidavit, documentary or other written evidence, and the auditing of claims upon a sampling or other basis.

6. (1) Where the court makes an aggregate assessment but the circumstances render impracticable the determination of those class members entitled to share in the award or the exact share that should be allocated to particular class members, the court should be able to order that the class members are entitled to share in the award on an average or proportional basis where the failure to so order would deny recovery to a substantial number of class members who have been injured.

(2) Where an average or proportional distribution is ordered, class members should have the right to apply to the court to prove their claims on an individual basis. Any amounts so recovered by class members should be deducted from the amounts to be distributed on an average or proportional basis.

*7. (1) Where it proves impossible to distribute all of an aggregate award to individual class members under Recommendation 4, 5, or 6, the court should be able to order a *cy-près* distribution of the residue in a manner that may reasonably be expected to benefit some or all of the members of the class.

(2) The proposed *Class Actions Act* should specify that a *cy-près* distribution may be implemented through a conditional return of funds to the defendant to be applied in a manner determined by the court to be beneficial to the class.

(3) The proposed *Class Actions Act* should make it clear that the fact that a *cy-près* order made for the benefit of all, or part, of a class may incidentally benefit persons who are not class members or who have already received monetary relief through some other form of distribution should not be a bar to the making of such an order if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief will benefit thereby.

**8. Where compensation of class members is not possible, either directly, or indirectly by means of a *cy-près* distribution order, the court should be able to order that the residue of any aggregate award either be forfeited to the Crown or returned unconditionally to the defendant, as the court considers proper.

9. Before the court makes a *cy-près* distribution order or orders that the residue of an aggregate award be forfeited to the Crown or returned unconditionally to the defendant, notice should be given to the Attorney General, who should be able to make submissions concerning the propriety of such an order.

10. Individual proceedings for the assessment of monetary relief should be required only where an aggregate assessment of monetary relief is not

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* Mr. B.A. Percival dissents from this recommendation. See *supra*, note 292.

** Mr. B.A. Percival dissents in part from this recommendation. See *supra*, note 364.

feasible or where the amount to which class members are entitled cannot be determined as a common question.

11. The proposed *Class Actions Act* should give the court a discretion to permit adjustment in the terms of payment of a class action judgment, where this is in the best interests of the class members or the community. Accordingly, the court should be able,

    (a) to order that any amount awarded, as a result of either an aggregate assessment or individual assessments, be paid in a lump sum, forthwith or within such period as the court may fix, or in instalments;

    (b) to order that the execution or distribution of any part of a judgment be stayed for a reasonable period; and

    (c) to supervise the execution of any judgment and the distribution of any funds.

12. In directing the manner in which a class action judgment should be paid or in granting a stay of the execution or distribution of such a judgment, the court, in order to protect the interests of class members, should be able to impose such terms and conditions as it considers appropriate.

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